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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN
LUMBER COMPANY,
*Petitioner (Appellant-
Defendant below),*

vs.

CHESTER A. BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION FOR AND ON BEHALF OF THE UNITED STATES,
*Respondent (Appellee-
Plaintiff below).*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT OF PETITION.**

HENRY H. KOVEN,
1 North La Salle St.,
Chicago 2, Illinois,
Counsel for Petitioner.

LOUIS E. LEVINSON,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Julian Lentin doing business as J. Lentin Lumber Co. at Chicago, represents that the United States Circuit Court of Appeals for the Seventh Circuit denied his petition for rehearing on December 5, 1945 (R. 305); and that said Court entered order and judgment on November 9, 1945 (R. 293; Opinion by Hon. Otto Kerner, C. J., (R. 283) affirming judgment for \$45,665.94 and costs, together with permanent injunction against petitioner by

the District Court of the United States for the Northern District of Illinois, Eastern Division, Hon. John P. Barnes, D.J. presiding in a trial without jury (R. 254) in an action by Chester A. Bowles, Price Administrator, against petitioner involving OPA Maximum Price Regulations 94 (Appendix B) and 458 (Appendix C) (both as amended) relating to lumber (pp. 19, 21, *post* respectively).

As will be presently developed, it is not disputed that petitioner's gross profit was less than \$3,000.00, for which judgment for \$45,665.94 was entered against him.

The complaint, in two counts, against petitioner and eighteen others, the latter all purchasers, prays for injunctive relief and for treble damages on alleged excess prices amounting to \$20,000.00 and *ad damnum* for \$60,000.00, relating to nineteen car loads of Mexican Ponderosa Pine and oak lumber. During the trial, Chester A. Bowles, Price Administrator, was granted leave to amend his complaint to cover nine additional car loads by adding to the amount of treble damages claimed, an additional \$30,000.00 making the total claimed \$90,000.00 (R. 147). No injunctive order was entered against the eighteen purchaser defendants, nor were they included in the judgment (R. 60, 61, 254). The case against said purchaser defendants was not tried (R. 60, 61).

Petitioner, before placing orders for import shipment of Mexican lumber with the Pan American Trading Company (Hinojosa) of Kansas City, Missouri, sought (R. 180) information from Mr. Huntley, Senior Business Analyst of the Office of Price Administration (Chicago) (R. 179, 199, 200) to whom petitioner disclosed that petitioner had an opportunity to buy a certain number of car loads of Mexican Ponderosa Pine at a price. He was advised by Huntley that imported lumber was not subject to OPA price ceilings, and could be purchased without regard to regulations. Thereafter petitioner received Amendment 8 to

MPR 94 (set forth R. 42, 43). The fourth paragraph of the Press Release, which is a part of the Amendment, recites:

"There are no price ceilings on purchases of Mexican pine lumber outside the United States, and both Defense Supplies Corporation *and the private importer* have been buying Mexican pine at prices close to the domestic pine ceilings for resale domestically to U. S. war agencies" (R. 42). (*Italics ours.*)

This recital of the Press Release was dismissed by the trial attorney for OPA by stating that the Amendment applied only to Defense Supplies Corporation, a government agency (R. 126, 179, 180) and not to any *private* purchasers (R. 127) and by the trial court's characterization of the Press Release as being of no binding effect.

Huntley at first denied the conversation with petitioner (R. 218); and afterwards stated that he did not remember it (R. 218), but that he (Huntley) had spoken to someone about Mexican import pine (R. 218).

Petitioner, in sixteen of the nineteen carloads* (import of Mexican lumber) was a broker or factor, in car load sales, and as such not subject to the damage provisions of Section 205 (e) of the Emergency Price Control Act of 1942, as amended (set forth as Appendix A, p. 17 *post*), which relates solely to sellers, and not to brokers, factors or purchasers. But the trial court refused to consider petitioner's offered evidence on that theory, giving as

* An order (R. 272) was entered by the District Court on stipulation that the original exhibits be withdrawn and substituted by photostatic copies on appeal (R. 272). In connection with the printing of the record on appeal to the Circuit Court of Appeals, it was stipulated (R. 274) "that all of the photostatic copies of the Exhibits filed as a part of the record herein need not be printed but counsel for the parties may refer to the said Exhibits in their respective briefs and arguments." Petitioner intends to make application to this court to file 10 certified copies of his brief in the Court of Appeals.

reason that petitioner "tried to cover up the transaction to attempt to show he was a broker after he had title" (R. 190).

Petitioner placed his orders with the shipper Victor Hinojosa (doing business as Pan American Trading Company), a resident of Kansas City, Missouri, engaged as an importer of Mexican Ponderosa Pine (R. 209). Said Hinojosa, shipper of all of the pine involved, was not permitted by the trial court to testify that petitioner ordered the cars out car by car on the order of each particular purchaser served by petitioner (R. 211). The business practice of petitioner was to invoice* the purchaser at the exact price paid Hinojosa, the shipper, and an invoice for \$3.00 or in three instances for \$4.00 per MBM by petitioner for handling. In short, as to sixteen car loads, petitioner was a broker or factor and not subject to assessment of damages under Section 205 (e) of the Price Control Act of 1942, as amended.

As to the remaining three of the original car load lots, the trial court excluded petitioner's evidence and denied petitioner's offer of proof (R. 173) that petitioner had distribution yard facilities. Under Section 3 MPR 94, provision is made for higher prices for lumber sold in less than carload lots out of distribution yards.

Concerning the nine car loads added to the complaint, no evidence of overcharge is in this record other than that the attorney for the Price Administrator, in argument (R. 220) stated that he had established that the prices for the nine cars were computed the same way as the original nineteen cars and by applying the same "proportion", the overcharge on said nine additional cars would be \$6,462.48 (R. 220).** On the basis of that "proportion"

* See Plaintiff's (Respondent's) Exhibits 6, 6A, 6B, 14B, 19A, and 21A.

** Chart prepared by respondent, Plaintiff's Exhibit 51.

the trial court included in his finding a judgment in the sum of \$12,942.96 as a part of the total judgment of \$45,664.94 (R. 220). The latter amount was arrived at by the trial court by doubling the aggregate amount of alleged overcharges in plaintiff's (respondent's) Exhibit 51 and adding to same double the amount of respondent's "proportional" estimate.

Petitioner adduced as his witnesses several owners of the retail yards, who were among the purchaser defendants, to whom the lumber was sold, for the purpose of establishing the actual quality of the lumber when examined and graded by them (R. 153-155, 162, 169, 173, 177-191, 197); but all such testimony was excluded and the trial court denied petitioner's offer of proof that same would show that the actual grades contained in the cars were such as enabled the public to purchase at prices within the price ceilings (R. 154).

So, too, the trial court refused petitioner credit, viz., addition of \$2.00 for specified 16, 18 and 20 foot lengths, 4 and 6 inch widths, as provided in MPR 94 (R. 117 to 126).^{*} That item amounts to about \$2,000.00 or to about \$4,000.00 of the judgment.

The trial court allowed one Baxter to testify for the plaintiff that he was a lumber dealer and had been offered Mexican Ponderosa Pine by the Pan American Trading Company at \$55.00 per M board feet and that he corresponded with the Kansas City office of OPA about this

^{*} Respondent's (Plaintiff's) Exhibits 4, 5b, 5c, 5d, 5e, 5f, 5g, 6, 6a, 7, 7a, 8c, 8d, 9, 9a, 10, 11, 11a, 12, 12a, 13a, 13b, 14, 14a, 15d, 15e, 16, 16a, 17, 17a, 18, 18a, 19, 20, 21, 22 and 23, are all copies of invoices from Pan American Trading Company, to J. Lentin Lumber Co., petitioner, from Pan American Trading Company to several retail yards which purchased the lumber, and from petitioner to said retail customers. See, also, Petition for Rehearing, R. 300, 301.

offer and was advised that the purchase would violate the price ceilings imposed by MPR 94 (R. 135 *et seq.*). Baxter thereupon refused to handle the lumber. Petitioner moved to strike Baxter's testimony (R. 158) and objected to the admission in evidence of letters between Baxter and said Kansas City office of OPA. The motion to strike was denied and the exhibits were received for the purpose of showing what petitioner should have known with his experience as a business man (R. 149).

The trial court stated that petitioner was

- (1) a person who dodged the regulations (R. 231);
- (2) a person who, by marking his invoices to show that the lumber was invoiced to retail purchasers at a price, and charging an additional sum for handling the lumber was thereby covering up his guilt by attempting to show that he was a broker (R. 190);
- (3) a person who had mulcted the public out of \$16,000.00 for the sake of making a profit of \$2,400.00 (R. 189);
- (4) a person who was particularly guilty of trying to evade the regulations because he consulted with officials of OPA (R. 179); and
- (5) a person who was a defendant in one of the worst cases of violation of OPA regulations that had ever been presented to him (R. 230).

The plaintiff, Price Administrator, failed to introduce any evidence wherefrom the trial court could have arrived at its opinion of petitioner.

QUESTIONS PRESENTED.

I.

Is a judgment for statutory damages valid, where the trial judge is prejudiced against the class of case (exceeding ceiling prices under OPA) and prejudices the merits of the case upon the basis of said prejudice?

II.

As a rule of decision to serve as guidance for the future:

1. How certain should an OPA press release be? And should it operate uniformly throughout the United States?
2. Is a defendant in an overceiling price case barred from showing his good faith in ascertaining the scope of endlessly complicated regulations?
3. Is a broker or factor subject to the damage provision of Section 205 (e) Emergency Price Control Act as amended, notwithstanding that the section concerns itself with sellers only?
4. May damages be assessed against such defendant, as here, for nine additional cars, solely upon a mathematical theory of "proportion" without evidence as to the actual facts?
5. Where a regulation, such as MPR 94 authorizes higher prices at distribution yards, may a trial judge arbitrarily refuse to allow a defendant to show that he actually has distribution yards?

6. Where said regulation MPR 94 authorizes credit for 16, 18 and 20 foot lengths at \$2.00 per M.B.M. may a trial court arbitrarily refuse to consider same and add about \$4,000.00 to the amount of the judgment?
7. Is the entry of a permanent injunction valid in this case, in the light of the holding in *The Hecht Company v. Bowles, etc.*, 321 U. S. 321?

REASONS FOR ALLOWANCE OF WRIT.

1. Where a trial court by remarks not founded upon the record evidences prejudice against the case, as belonging to a class of cases, all proceedings on the hearing are void. The absence of the organic basis of due process of law renders the trial a mere mask and not a hearing according to the law of the land.

2. Under Section 205 (e) of the Emergency Price Control Act a broker or factor may not be subject to a damage action.

3. Should an OPA press release operate uniformly throughout the United States and may a layman seek the advice of a local OPA office and be condemned for relying thereon?

4. Every rule for the measure of damages has been violated by the entry of the judgment against petitioner for \$45,665.94.

5. The judgment for \$45,665.94, upon the undisputed showing that the gross profit to petitioner did not exceed \$3,000.00, is cruel punishment not contemplated by either the so-called Emergency Price Control Act, or the Stabi-

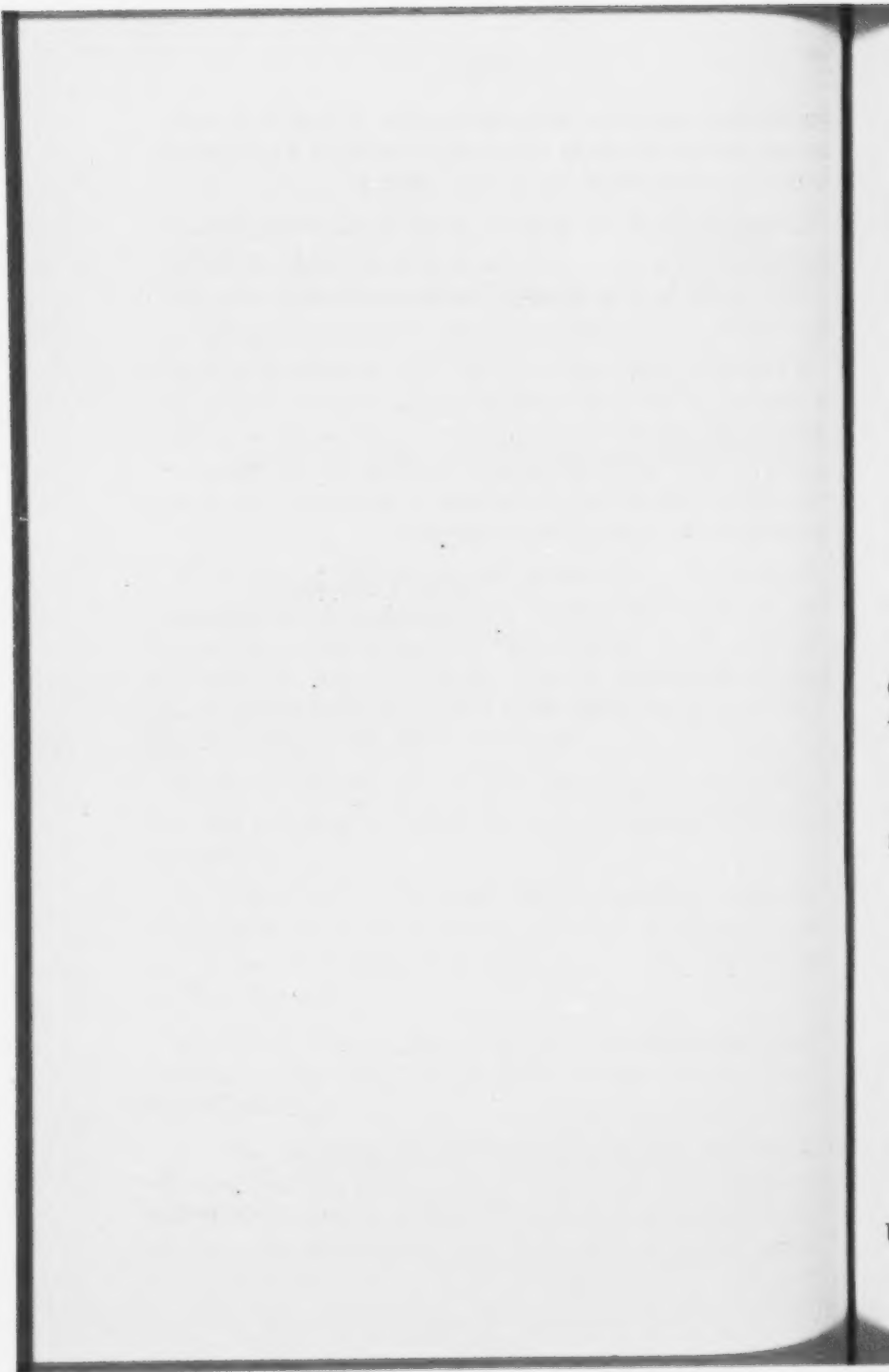
lization Act, and constitutes confiscation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. In sustaining the injunction herein the Circuit Court of Appeals has ruled contrary to the applicable decision of this Court in *The Hecht Company v. Bowles, etc.*, 321 U. S. 321.

WHEREFORE petitioner prays for the issuance of a Writ of Certiorari to said United States Circuit Court of Appeals for the Seventh Circuit in conformity with the applicable Acts of Congress and the Rules of the Supreme Court of the United States; and that upon the consideration of this petition, said Writ be allowed.

HENRY H. KOVEN,
Counsel for Petitioner.

LOUIS E. LEVINSON,
Of Counsel.



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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

I.

Jurisdiction of this court.

Petitioner invokes the jurisdiction of this court under
U. S. C. Tit. 28, secs. 347 and 350.

II.

The remarks of the trial court not founded upon the record, and relating to other cases, evidence prejudice against petitioner's case, as belonging to a **CLASS** of cases, and render the hearing and judgment void.

Moore v. Dempsey, 261 U. S. 86, 91.

Brown v. Mississippi, 297 U. S. 278, 285.

Hawk v. Olson, 90 L. Ed. (U. S.) 67, 70.

Boykin v. Huff, 121 Fed. (2d) 867, 872 (C. A. D. C.) opinion by Mr. Justice Rutledge.

(a) The absence of the organic basis of due process of law renders the trial a mere "mask" and not a hearing according to the law of the land.

See authorities, *supra*.

(b) Petitioner had no right to file an affidavit of bias and prejudice, as the prejudice was not personal but against a class of cases.

U. S. C. Tit. 18, sec. 25.

III.

Under section 205(e), as amended, of the so-called **Emergency Price Control Act of 1942** damages can be assessed only against sellers and not against brokers or factors.

Appendix A, p. 17 *post*.

(a) The trial court's refusal of petitioner's evidence showing his good faith, in the light of the prejudice against the class of cases to which the instant case belongs, is a clear denial of a trial according to the law of the land.

Moore v. Dempsey, 261 U. S. 86, 91.

Brown v. Mississippi, 297 U. S. 278, 285.

(b) The trial court's exclusion of petitioner's evidence and refusal of offers of proof worked a confiscation of petitioner's property in violation of the Fifth Amendment in assessing damages referable to the following items:

1. Petitioner's distribution yards and facilities;
2. Credit for 16, 18 and 20 feet lengths;
3. Petitioner's status as a broker;
4. The alleged overcharges on 9 cars not covered by the original complaint;
5. As to the grade of lumber.

IV.

Exclusion of petitioner's evidence and offers of proof to show that he sought the advice of Huntley of the Chicago OPA office renders the judgment a confiscatory deprivation of property without due process of law.

(a) Petitioner was entitled to show good faith under Section 205 (e) of the 1942 Emergency Price Control Act, as amended.

Appendix A, p. 17 *post*.

(b) Respondent and the trial court erred in considering that petitioner was trying to create an estoppel against a governmental agency.

(c) The duty of petitioner as an established, reputable lumber dealer was to facilitate national security by supplying lumber for civilian use. *Salus populi est suprema lex.*

(d) The wording of the press release, part of Amendment 8, was clear enough to work legal compulsion upon petitioner.

United States v. United States Steel Corporation,
251 U. S. 417, 447.

Panama Refining Co. v. Ryan, 293 U. S. 388, 429.

(e) Baxter's testimony, relating to his experiences with the Kansas City, Missouri, office of the OPA should have been stricken, for under the general rule known as *res inter alios acta* a litigant cannot be affected by the words or acts of others with whom he is in no wise connected and for whose words or acts he is not legally responsible.

32 C. J. S. Evidence, p. 432, sec. 576.

General Motors Corporation v. Blackmore, 53 Fed.
(2d) 725, 729.

(f) The trial court's reliance upon Baxter's experiences with the Kansas City office of OPA against petitioner's experiences with the Chicago OPA office denied to petitioner the guaranty of Article IV Section 2 of the Constitution of the United States, viz.: "The citizens of each state shall be entitled to all of the privileges and immunities of the several states."

V.

The judgment is based upon a measure of damages which confiscates petitioner's property without due process of law.

(a) Here the items were mathematically tabulated, in documents without relevant supporting evidence, and the court merely doubled same and entered judgment.

(b) "The court cannot predicate a judgment for damages upon the mathematical suppositions of the claimant. Proof resting not in conjecture must be offered; calcu-

lations as to the percentage of the cost of material, etc., cannot form the basis for the judgment asked in respect to this item and it will be disallowed. Damages must be the direct and proximate result of the injury complained of and when capable of proof with certainty must be so proven. This rule is elementary."

Wyant v. United States, 46 U. S. Ct. Cl. 205, 210.

(c) This is not a case within the general rule that uncertainty which affects the measure or extent of the injury does not bar a recovery.

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 379, and authorities cited.

(d) Nor is this a case where a defendant by his conduct renders difficult the ascertainment of damages. Here the court merely doubled the aggregate amount of alleged overcharges in plaintiff's (respondent's) Exhibit 51 and added to same double the amount of respondent's "proportional" estimate. All of the data were either courteously furnished by petitioner or could have been readily obtained by respondent. If any misconduct intervened it was the trial court's prejudice against the class of cases to which the instant case belongs.

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 379, and authorities cited.

(e) There is no dispute in the record that petitioner's gross profit was less than \$3,000.00, for which judgment for \$45,665.94 was entered against him. Such cruel punishment is not contemplated by either the original so-called Emergency Price Control Act or the Stabilization Act, or any amendment to either of said acts, and constitutes confiscation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

VI.

The injunction is contrary to the applicable doctrine of this court.

(a) All of the evidence is that the alleged transactions complained of have been discontinued in good faith, before commencement of suit, and that petitioner will not again enter into same.

(b) The holding of the Court of Appeals for the Seventh Circuit is contrary to the applicable decision of this court in *The Hecht Company v. Bowles*, 321 U. S. 321.

For the several reasons herein presented it is deferentially urged that the writ of certiorari be allowed.

Respectfully submitted,

HENRY H. KOVEN,
Counsel for Petitioner.

LOUIS E. LEVINSON,
Of Counsel.

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APPENDIX A.

Emergency Price Control Act Section 205 (e)
As Amended.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) An amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges, or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum

price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

APPENDIX B.

MPR 94.

The pertinent provisions of MPR 94 are as follows:

"§ 1381.501 *Sales of Western pine and associated species of lumber at higher than maximum prices prohibited.* (a) On and after December 29, 1942, regardless of any contract or other obligation, no person shall sell or deliver, and no person shall buy or receive in the course of trade or business, any Western pine and associated species of lumber for direct-mill shipment at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer or attempt to do any of these things. Maximum f. o. b. mill prices are set forth in Appendices A to H.

"(b) Prices lower than the maximum prices may, of course, be charged and paid.

"§ 1381.506 *Prohibited practices*—(a) General. * * *

"(b) *Specific practices.* The following are among the specific practices prohibited:

. . .

"(3) Selling as specified lengths or widths a shipment of lumber which is substantially equivalent to random lengths or widths; or re-selling as specified lengths or widths a shipment bought by the seller as random lengths or widths.

. . .

"(d) *Combination grades.* Lumber sold on combination grades may not be sold at above the maximum price for

the lowest grade actually named in the combination. For example the maximum price for No. 2 common and better is that set for No. 2 common. Of course the amount of the different grades included can be quoted and shown separately on the invoice at the individual prices for those grades. Also, it is permissible to sell on the basis of a stated percentage of better grades, such as No. 2 with 15% No. 1. In this case the price of 15% of the footage may be the No. 1 price if the invoice shows that the footage tally of the lumber actually shipped runs at least 15% No. 1. It is also permissible to quote a grade at that grade's price, with higher grades developing to be included at the grade differential. For example, when a seller quotes No. 2 at the No. 2 price, with No. 1 developing to be included at the No. 1 price, this is proper, since no actual dollars-and-cents quotation above the No. 2 price is made. Again, the final price must be based on actual tally. Note, however, that it is a violation to insist on the buyer's taking grades he does not want in order to get the grade he does want."

APPENDIX C.

MPR 458.

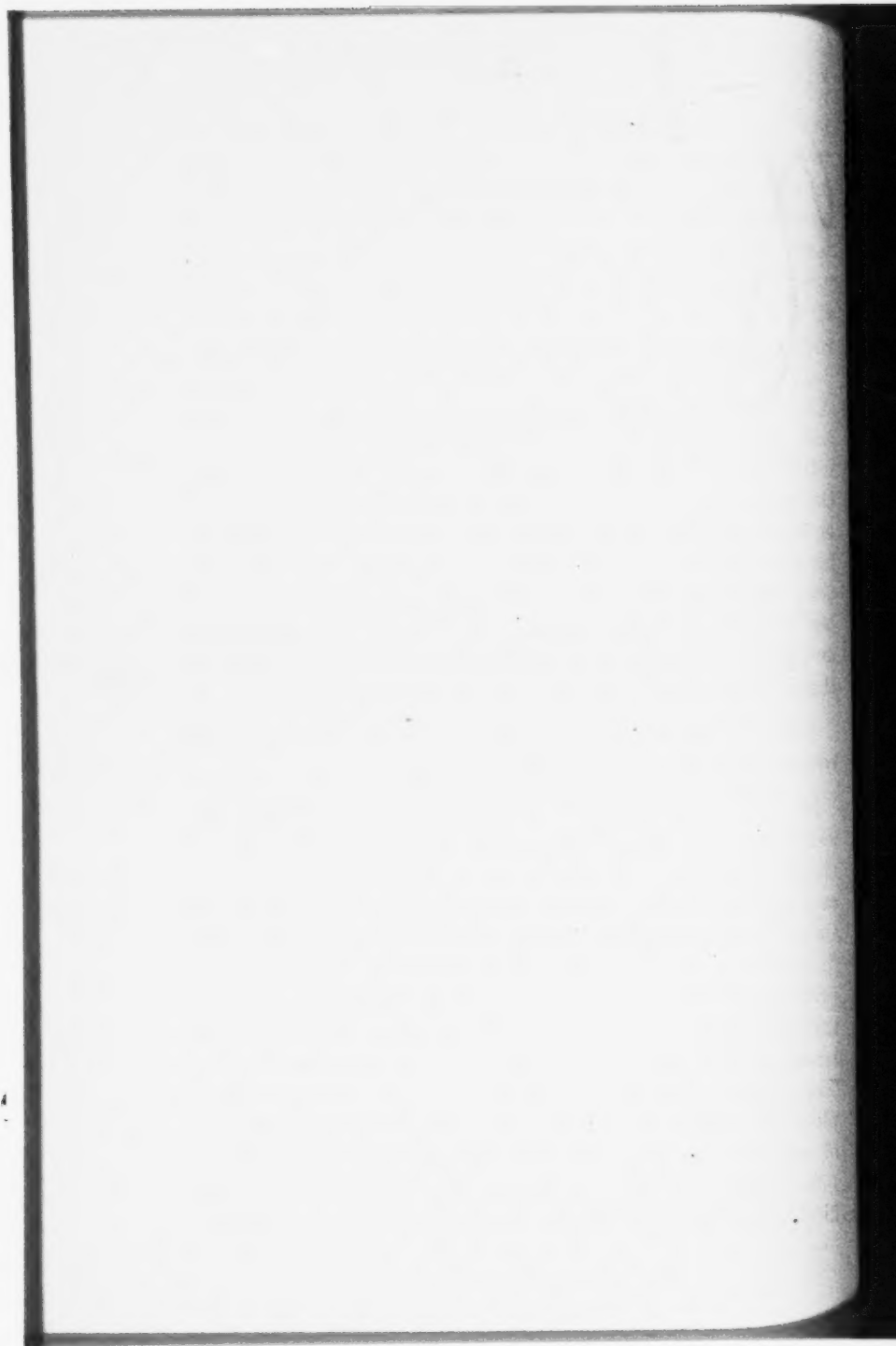
The pertinent provisions of MPR 458 are as follows:

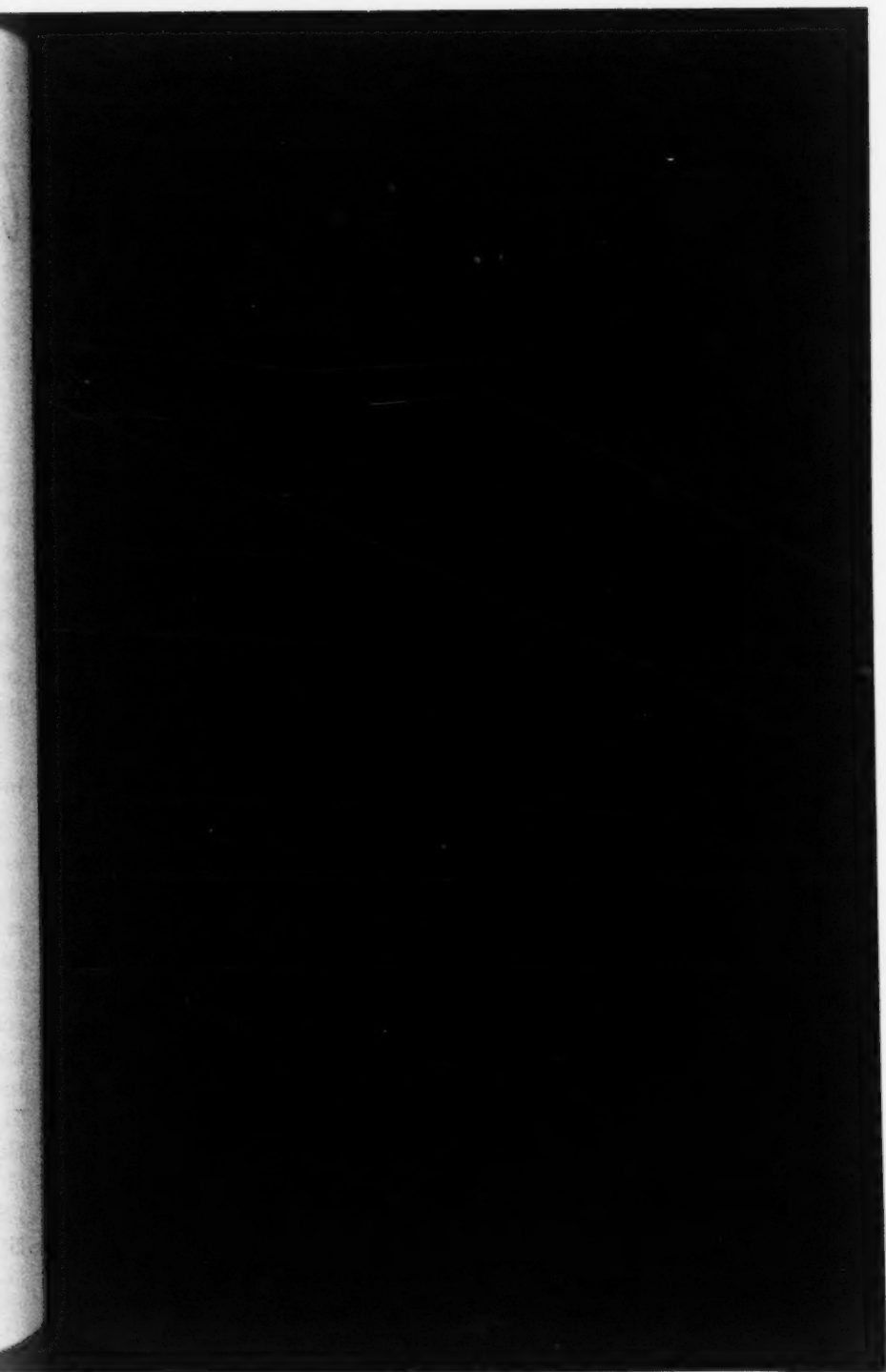
Article I—Scope of the Regulation

SECTION 1. *Prices higher than ceiling prohibited.* (a) On and after August 28, 1943, regardless of any contract or other obligation, no person shall sell or deliver and no person shall buy or receive in the course of trade or business, any oak flooring for direct-mill shipment at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer, or attempt to do any of these things.

(b) Prices lower than the maximum prices may, of course, be charged and paid.

SEC. 2. *What products, transactions, and persons are covered.* This regulation covers all direct-mill sales of standard grades and victory grade of oak flooring, graded as such under the effective Grading Rules of the National Oak Flooring Manufacturers' Association, and also prefinished oak flooring. For the purposes of the regulation, prefinished oak flooring means oak flooring that has been sanded, filled, waxed, and pressure-rubbed to form a finished product ready for immediate use after installation. The regulation applies regardless of the kind of mill or plant in which the flooring is produced, and regardless of whether the particular item is specifically priced in the price tables or not. Any person who makes a sale of this kind, for himself or others, is subject to this regulation.





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(I)

THE HISTORY OF THE

ROYAL SOCIETY

OF LONDON

FROM THE

FOUNDATION

TO THE

PRESENT TIME

BY

JOHN

DELAUNE

ESQ.

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN
LUMBER COMPANY, PETITIONER

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, FOR AND ON BEHALF OF THE
UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the district court. Its findings of fact and conclusions of law are set forth at pages 252-254 of the Record. The opinion (R. 284-292) of the circuit court of appeals is reported in 151 F. 2d 615.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 9, 1945 (R. 293), and a petition for rehearing (R. 297-304) was denied

on December 5, 1945 (R. 305). The petition for a writ of certiorari was filed on February 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by reason of alleged prejudice on the part of the trial judge.
2. Whether petitioner sold a commodity at a price in excess of the legal maximum and was therefore liable for statutory damages under Section 205 (e) of the Emergency Price Control Act.
3. Whether the trial court improperly excluded or failed to consider any relevant evidence.
4. Whether the trial court properly computed the amount of the overcharges exacted by petitioner in selling lumber at prices in excess of the legal maximum.
5. Whether a judgment for \$45,665.94, being twice the amount of overcharges exacted by the petitioner in selling lumber at prices in excess of the legal maximum prices, is authorized by Section 205 (e) of the Emergency Price Control Act and if so whether the statute violates the Fifth Amendment.
6. Whether the trial court erred in enjoining the petitioner from violating the Emergency Price Control Act of 1942 as amended.

STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of 1942, as amended, and the pertinent provisions of the applicable regulations of the Price Administrator are set out in the Appendix, *infra*, pp. 12-16.

STATEMENT

This action was brought by the Price Administrator to enjoin the petitioner pursuant to Section 205 (a) of the Emergency Price Control Act from violating the Act and to recover statutory damages under the provisions of Section 205 (e) of the Act as a result of the alleged sale by the petitioner of 28 carloads of Mexican ponderosa pine at prices in excess of those permitted by Maximum Price Regulation 94 and one carload of white oak flooring at prices in excess of those permitted by Maximum Price Regulation 458 (R. 3-9). The Mexican ponderosa pine was purchased by petitioner f. o. b. El Paso, Texas, from Pan-American Trading Company (hereinafter called Pan-American) of Kansas City, Missouri (R. 35, 131).

After a trial without a jury, the district court found that petitioner between October 20, 1943, and April 27, 1944, had purchased and sold lumber at prices in excess of the maximum prices established by the respective regulations; that the sales were not made to purchasers for use or consumption other than in the course of trade or business; that the sales and purchases at prices in excess

of the lawful maximum prices were knowingly and wilfully made by petitioner and were known by him to be in violation of the respective regulations; that the testimony of petitioner with respect to his purchases and sales of lumber was false in material respects; and that the amount by which the prices received by petitioner exceeded the applicable maximum prices therefor was \$22,832.97 (R. 252-253). The court, therefore, entered judgment in favor of the respondent for twice this amount (\$45,665.94) and enjoined the petitioner from violating the Act (R. 254).

The circuit court of appeals affirmed the judgment, holding that petitioner had received an impartial trial; that respondent was not estopped from maintaining the action; that in respect to the lumber involved in the action petitioner was not a broker or factor; that the trial court had not excluded or failed to consider any relevant evidence; that the overcharges exacted by petitioner had been correctly computed by the trial court; and that the trial court had not abused its discretion either in entering judgment for twice the amount of the overcharges or in issuing an injunction (R. 284-292).

ARGUMENT

The decision of the court below is correct, and there is no conflict of decisions. The questions which petitioner seeks to raise are not of great importance and consist largely of questions of

fact which have been resolved against him by the concurrent findings of the two lower courts.

1. The record contains no support whatever for petitioner's assertion that the trial judge was prejudiced "against petitioner's case, as belonging to a class of cases" (Pet. 12). It is true that the judge made several remarks which were critical of the petitioner. These remarks were made only during the closing stages of the trial and reflected the judge's view of what the evidence disclosed. There is nothing to indicate that petitioner did not receive a fair trial or that the judge was prejudiced either against petitioner or against any class of cases. At most, the court's remarks expressed a disapproval of petitioner's acts and conduct not only before but during the trial. They fall far short of disclosing bias or prejudice. Cf. *Glasser v. United States*, 315 U. S. 60, 83.

2. There is no merit in the contention (Pet. 7, 8, 12) that in respect to the lumber involved in this action petitioner was a broker or factor and not a seller and therefore not liable for statutory damages under the provisions of Section 205 (e) of the Act. Both the district court (R. 253) and the circuit court of appeals found "that Pan-American sold and defendant [petitioner] purchased the lumber, and that he in turn sold it to his customers" (R. 288). These concurrent findings of the two lower courts are amply sup-

ported by the evidence, and there is nothing in the record which would warrant disturbing them. Cf. *Baumgartner v. United States*, 322 U. S. 665, 670.

3. The trial court did not exclude or fail to consider relevant evidence (cf. Pet. 7, 12-13). The court excluded evidence of the fact that petitioner had distribution yard facilities. This evidence was offered with a view of invoking Section 1381.502 of the Maximum Price Regulation 94 which provides that the regulation "does not apply to sales out of distribution yard stock." But the same section also provides that "a sale is considered out of distribution yard stock only if the lumber was a part of regular yard stock at the time the sale was made." None of the lumber involved in this action was ever in a distribution yard. The proffered evidence, therefore, was plainly irrelevant. The court also rejected petitioner's offer to prove that some of the lumber was of a higher grade than that shown on the invoices issued by Pan-American to petitioner and by petitioner to his customers. In view of the fact that the applicable regulation (Maximum Price Regulation 94) expressly provides that, "failure to invoice properly is just as much a violation of this regulation as charging an excessive price" [Sec. 1381.505], petitioner was bound by the invoices. The rejected evidence therefore had no tendency to prove either that petitioner did not

violate the regulation or that he did not wilfully do so.¹

Nor was there any error in declining to hold that the petitioner had not wilfully violated the regulations because of his alleged reliance on a press release issued by the Office of Price Administration explaining Amendment 8 to Maximum Price Regulation 94, or because of his alleged reliance on advice which he claimed was given him by one Huntley, an employee of the Office of Price Administration (cf. Pet. 8, 13). The press release states that "there are no price ceilings on purchases of Mexican pine lumber outside the United States" (R. 42). Petitioner did not buy or sell the Mexican pine lumber outside of the United States. He purchased it from Pan-American f. o. b. El Paso, Texas and sold it in the United States (R. 20-23, 35-36, 131, 146, 150, 186, 187). As the court below said, "Not even the most generous interpretation could bring defendant within the cloak of such an authorization" (R. 287). As for petitioner's alleged conversation with Huntley, in the course of which petitioner claimed that Huntley had

¹ Section 205 (e) of the Act, as amended, provides that if a defendant charged with selling a commodity at a price in excess of that established by a maximum price regulation proves that his violation of the regulation was neither wilful nor the result of a failure to take practicable precautions to prevent the occurrence of the violation, his liability shall be restricted to the amount of the overcharges exacted or \$25, whichever is the greater.

advised him that there were no price restrictions on imported lumber, it is sufficient to say that Huntley denied categorically that he gave petitioner any such advice (R. 216-218) and, as the court below observed (R. 290), the trial court preferred to credit Huntley's testimony.

4. Petitioner's contention (Pet. 7, 8, 9, 14-15) that the trial court incorrectly computed the amount of the overcharges exacted by petitioner is untenable. Petitioner tacitly concedes, as he did in the court below, that the overcharges in respect to all but nine of the twenty-eight carloads of Mexican ponderosa pine lumber were correctly computed. In respect to the nine carloads, he claims that the evidence did not sufficiently disclose the amount of the overcharges collected (Pet. 4-5). We submit that the contrary is the fact. The proof which petitioner contends is inadequate consisted of:

(a) The bank drafts listed in plaintiff's Exhibit 58, which show that the nine cars of lumber in question were purchased and the prices paid therefor (R. 143, 149; see R. 271-272, 274, 310).

(b) The petitioner's testimony (R. 146) that he sold the nine carloads for the same price and on the same terms and conditions as the remaining nineteen cars.

(c) Plaintiff's Exhibits 4 to 23 inclusive which show the prices at which petitioner sold the remaining nineteen cars (R. 88, 89, 107, 142; see R. 271-272, 274, 310).

(d) The orders for all twenty-eight carloads (Pl. Exs. 4 and 30) which show the grade of lumber ordered, the amount paid per 1000 board feet, and the kind of lumber in each car (R. 89, 177, 84-85, 147-148, 149, 210, 232; see R. 271-272, 274, 310).

The evidence, therefore, showed all the facts necessary to compute with reasonable accuracy the amount of the overcharges, namely, the amount and kind of lumber sold, what it was sold for, and the maximum selling price established by the regulation.

5. Contrary to petitioner's views (Pet. 8, 15), no error was committed in entering judgment against petitioner for \$45,665.94 notwithstanding the fact that the profit which petitioner realized from the illegal transactions amounted to only \$3,000. Section 205 (e) of the Act fixes the liability of one who sells a commodity at a price in excess of the legal maximum at not less than the amount of the overcharge nor more than three times the amount. Here the judgment was for only twice the amount of the overcharges.

In providing for such a recovery the Act violates no constitutional guarantee. *Gurman v. Illg and Bowles*, No. 98, present Term, certiorari denied October 8, 1945; cf. *United States ex rel. Marcus v. Hess*, 317 U. S. 537; *Chattanooga Foundry v. Atlanta*, 203 U. S. 390; *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 112. Concededly, in certain circumstances, the requirements of due

process forbid the imposition of cumulative fines for the violation of a statute or administrative order pending an attempt to test its validity in the courts and for a reasonable time thereafter. *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310. But that principle has no application where administrative relief has not been sought and where, as here (*Yakus v. United States*, 321 U. S. 414), an adequate procedure for judicial review of a regulation is provided and the defendant fails to avail himself of it. *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 65; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651; *Gulf C. etc. Ry. Co. v. Texas*, 246 U. S. 58.

It may also be conceded that a statute imposing penalties may be unconstitutional under the Eighth Amendment if the penalties are so disproportionate to the offense as to be excessive. But in cases such as this, the validity of the statute is not to be tested by contrasting the penalty with the amount of the overcharge but by the public interest in having the statute obeyed and the relation of the penalty to that object. *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 67. When tested by that standard, the liability imposed by Section 205 (e), even if it could be classed as a fine within the meaning of the Eighth Amendment, cannot be said to be excessive. *Gulf C. etc. Ry. Co. v. Texas*, 246 U. S. 58.

6. Finally, the trial court did not err in issuing an injunction (cf. Pet. 8, 9, 16). The decision of the court below is in no sense in conflict with

the decision of this Court in *The Hecht Company v. Bowles*, 321 U. S. 321. This Court there held that whether an injunction should issue to restrain violations of the Emergency Price Control Act rests in the sound discretion of the trial court. Here the court below after an examination of the record held that the trial court did not abuse its discretion, and petitioner can point to nothing in the record to indicate that its decision is erroneous. The fact that petitioner had ceased to violate the Act is not of itself a sufficient reason to refuse an injunction. *The Hecht Company v. Bowles*, *supra*.

CONCLUSION

The decision of the court below is clearly right and does not involve any question of great importance. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD McGRATH,
Solicitor General.

WALTER J. CUMMINGS, Jr.,
Special Assistant to the Attorney General.

MILTON KLEIN,
Director of Litigation,

DAVID LONDON,
Chief, Appellate Branch,

A. M. DREYER,
Attorney,
Office of Price Administration.

MARCH 1946.

APPENDIX

Section 205 (e) of the Emergency Price Control Act of 1942, 56 Stat. 23, 33, 50 U. S. C. App. (Supp. IV), 901 *et seq.*, as amended by Section 108 (b) of the Stabilization Extension Act of 1944, 58 Stat. 640, 50 U. S. C. App. (Supp. IV), 925 (e), provides as follows:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occur-

rence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The pertinent provisions of Maximum Price Regulation 94, 7 F. R. 10848, as amended, are as follows:

§ 1381.501 *Sales of Western pine and associated species of lumber at higher than maximum prices prohibited.* (a) On

and after December 29, 1942, regardless of any contract or other obligation, no person shall sell or deliver, and no person shall buy or receive in the course of trade or business, any Western pine and associated species of lumber for direct-mill shipment at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer or attempt to do any of these things. Maximum f. o. b. mill prices are set forth in Appendices A. to H.

(b) Prices lower than the maximum prices may, of course, be charged and paid.

§ 1381.502 *What products, persons and transactions are covered—*(a) *What transactions are covered—*(1) *Direct-mill shipments.* This ceiling applies to all shipments originating at a mill, no matter who the seller is, and no matter whether he usually is known as a mill, wholesaler, retailer or anything else. It does not apply to sales out of distribution yard stock. (The prices for yard sales may be found either in Maximum Price Regulation No. 215 or in the General Maximum Price Regulation, depending on the nature of the sale and the purchaser.) A shipment is regarded as originating at a mill if the lumber reaches the purchaser without ever becoming an integral part of the stock of a distribution yard. A sale is considered a sale out of distribution yard stock only if the lumber was a part of regular yard stock at the time the sale was made. For example, if a retail yard takes an order for a defense housing project, and then brings the lumber from a mill, puts it in his yard, and delivers it as needed, the sale is subject to this regulation.

* * * *

(3) *No quantity limits.* There are no quantity limits on the transactions covered by this regulation. All direct-mill sales, large or small, are covered.

(b) *What products are covered—*(1)

General. This regulation covers all Western pine and associated species of lumber, whether the grades, sizes, and specifications are specifically named in the price tables or not. All grade terms have the meaning given in the "Standard Grading Rules" published by the Western Pine Association, and effective July 1, 1942; but any item not graded in accordance with these rules is nevertheless subject to this regulation.

(2) *Species and areas.* The following species from the following areas are covered by this regulation:

(i) Ponderosa pine (*pinus ponderosa*), Idaho white pine (*pinus monticola*), and sugar pine (*pinus lambertiana*) produced in Oregon, Washington, Idaho, California, Montana, Canada, and Mexico;

* * * * *

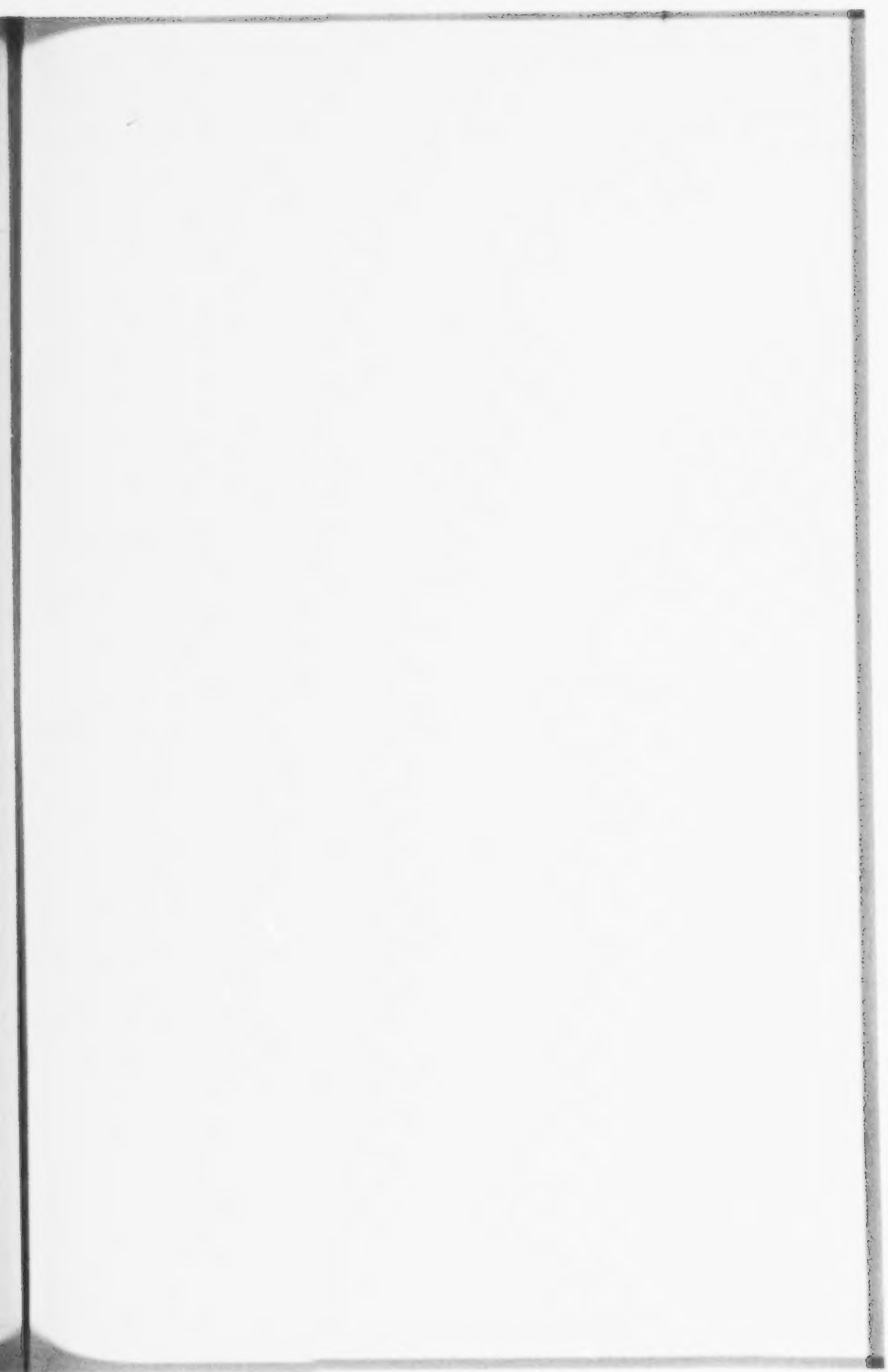
The pertinent provisions of Maximum Price Regulation 458, 8 F. R. 11736, as amended, are the following:

ARTICLE I—SCOPE OF THE REGULATION

SECTION 1. *Prices higher than ceiling prohibited.* (a) On and after August 28, 1943, regardless of any contract or other obligation, no person shall sell or deliver and no person shall buy or receive in the course of trade or business, any oak flooring and pecan flooring for direct-mill shipment at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer, or attempt to do any of these things.

(b) Prices lower than the maximum prices may, of course, be charged and paid.

SEC. 2. *What products, transactions, and persons are covered.* This regulation covers all direct-mill sales of standard grades and victory grade of oak flooring and pecan flooring, graded as such under the effective Grading Rules of the National Oak Flooring Manufacturers' Association, and also prefinished oak and pecan flooring. For the purposes of this regulation, prefinished oak and pecan flooring means oak and pecan flooring that has been sanded, filled, finished, waxed and pressure-rubbed to form a finished product ready for immediate use after installation. The regulation applies regardless of the kind of mill or plant in which the flooring is produced, and regardless of whether the particular item is specifically priced in the price tables or not. Any person who makes a sale of this kind, for himself, or others, is subject to this regulation.



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No. 805

No. 8788

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

CHESTER A. BOWLES, Administrator, Office of
Price Administration for and on behalf of the
United States,

Plaintiff-Appellee,

vs.

JULIAN LENTIN doing business as
J. LENTIN LUMBER COMPANY,

Defendant-Appellant.

Appeal from the District
Court of the United
States for the North-
ern District of Illi-
nois, Eastern Division.

Honorable
John P. Barnes,
Judge Presiding.

Brief and Argument for Appellant.

U. S. C. C. A. - 7

FILED HENRY H. KOVEN,

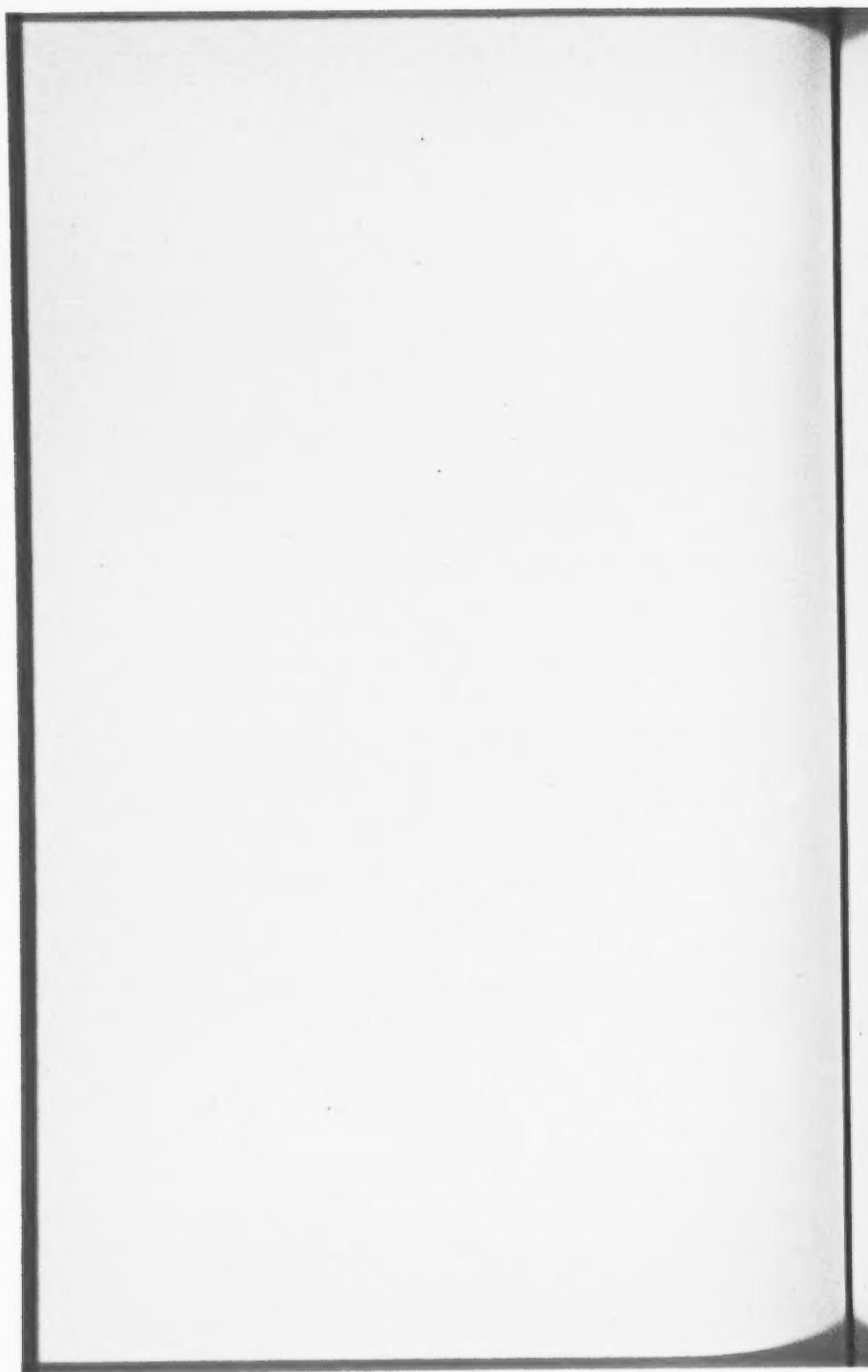
JUN 30 1945

KENNETH J. CARRICK

LOUIS E. LEVINSON, CLERK
Of Counsel.

1 N. LaSalle Street,
Chicago 2, Illinois,

Attorney for Appellant.



I N D E X.

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SUMMARY OF ARGUMENT.

The trial Court's comments about and characterizations of the defendant throughout the trial unsupported by any evidence establish the unfair and prejudiced attitude of the court in this case which is inconsistent with a fair trial and an unbiased consideration of evidence to which the defendant was entitled 18-22

The advice given to the defendant by an official of O.P.A. and the language of the Press Release which was issued by O.P.A. as a part of Amendment No. 8 MPR 94 and the circumstances surrounding the transactions including the nominal profit for which the defendant undertook it and did handle the transactions raises an estoppel against the plaintiff from recovering in this case 22-32

The Court refused to hear evidence tending to establish that the defendant was a factor or broker

SUMMARY OF ARGUMENT (continued).

in the handling of full car loads of lumber and as such was not subject to the damage provisions of the Emergency Price Control Act of 1942 32-36

The Court erroneously ruled out evidence and offers of proof tending to establish the defendant's lack of willfulness and his taking of practical precautions to avoid violations and the defendant was thereby deprived of the right to a consideration of evidence that had an important bearing on the amount of the judgment in excess of single damages 36-42

The damages of \$12,924.96 assessed for alleged overcharges of the nine additional car loads were not supported by proper and adequate evidence of overcharges 42-45

The testimony and exhibits of Charles L. Baxter were improperly received for purpose of establishing what a business man should have known about the lumber price regulations because the defendant had no knowledge of Mr. Baxter's experience and could not be bound by it for any purpose 45-47

The Court refused to allow the defendant to show that he had distribution yard facilities and to permit the defendant to show that ceiling prices of lumber in less than car load lots under MPR 94 and MPR 458 were higher than those allowed by the court and that the prices for less than car load lots charged by the defendant were not a violation of regulations 48-50

The trial Court erroneously refused to allow the defendant and his witnesses to testify to the grades of lumber contained in the cars and the defendant to testify to his knowledge of the grades contained in the cars; the offered testimony was pertinent to the question of the defendant's lack of willfulness to violate regulations 50-51

The defendant was erroneously denied credit for 16, 18 and 20 feet lengths which at the rate of

SUMMARY OF ARGUMENT (continued).

\$2.00 per M.B.M. resulted in an improper assessment of approximately \$4,000.00 against him 51-53

The entry of the permanent injunction against the defendant was not supported by any evidence of the likelihood of future violations and as to the injunction against the failure of the defendant to keep records was not supported by evidence of any past or future violation 54-57

LIST OF AUTHORITIES.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8788

CHESTER A. BOWLES, Administrator, Office
of Price Administration for and on behalf
of the United States,

Plaintiff-Appellee,

vs.

JULIAN LENTIN doing business as
J. LENTIN LUMBER COMPANY,
Defendant-Appellant.

Appeal from the District
Court of the United
States for the North-
ern District of Illi-
nois, Eastern Division.

Honorable
John F. Barnes,
Judge Presiding.

Brief and Argument for Appellant.

STATEMENT OF THE FACTS.

This is an appeal from a judgment and decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, on January 12, 1945 which contained certain findings of fact and conclusions of law, the most important of which are that the defendant, Julian Lentin d/b/a J. Lentin Lumber Company on divers dates from October 20, 1943 to the date of the filing of the complaint on April 27, 1944 had purchased and sold lumber for prices in excess of the Maximum Prices established therefor under Maximum Price Regulation No. 94 as amended and under Maximum Price Regulation No. 458 as amended, which sales were not made to purchasers for

use or consumption other than in the course of trade or business; that the said sales and purchases by the defendant, Julian Lentin, at prices in excess of the maximum prices aforesaid were knowingly and wilfully made by him and were known by him to be in violation of the applicable regulations; that the testimony of the defendant, Julian Lentin, with respect to his purchases and sales and otherwise was false in material respects and that the amount by which the prices received by the defendant exceeded the maximum prices was \$22,832.97.

Judgment was entered against the defendant, Julian Lentin, in the sum of \$45,665.94 and costs and a permanent injunction was granted restraining and enjoining the defendant from selling, purchasing, and otherwise dealing in lumber in excess of the maximum prices established therefor by Maximum Price Regulation No. 94 as amended and Maximum Price Regulation No. 458 as amended, or any Maximum Price Regulation now or which may hereafter be issued pursuant to Emergency Price Control Act as amended, and from failing to keep records required by the Regulations, and from otherwise violating the terms and provisions of any of the Regulations as now or hereafter amended.

THE PROCEEDINGS IN THE TRIAL COURT.

The Pleadings.

Chester A. Bowles, Administrator, Office of Price Administration on behalf of the United States, filed a complaint on April 27, 1944 in two counts in which he charged this defendant and eighteen other defendants who operated retail yards with violations of Maximum Price Regulations 94 and 458 in that certain sales and purchases of Mexican Ponderosa Pine and oak flooring were made by and to them in violation of the maximum prices established by Maximum Price Regulation No. 94 covering Western Pine and Associated Species of Lumber, as amended, and Maximum Price Regulation No. 458 covering Oak, Pecan and Miscellaneous Hardwood Flooring, as amended. The complaint alleges that the defendants, other than the defendant, Julian Lentin, purchased from the defendant, Julian Lentin, carloads and parts of carloads of the two species of lumber above mentioned at prices in excess of the prices established by the aforesaid Maximum Price Regulations 94 and 458.

The first count of the complaint alleges that unless enjoined each defendant will continue to violate the regulations. (Tr. 2-7)

The second count of the complaint charges the defendant, Julian Lentin, with having sold certain lumber described as Western Pine and Associated Species, and Hardwood Flooring in violation of Maximum Price Regulation No. 94 as amended and Maximum Price Regulation No. 458 as amended and that prices received by the defendant in excess of the applicable maximum prices

amounted to \$20,000.00 and that three times this amount equals \$60,000.00. The plaintiff seeks preliminary and final injunctions against all defendants from violating the regulations and preliminary and final injunction against the defendant, Julian Lentin, requiring him to prepare and keep records, reports, statements and invoices available for the Office of Price Administration in accordance with the regulations, and seeks judgment on behalf of the United States against the defendant, Julian Lentin, in the sum of \$60,000.00 and costs. (Tr. 7-9)

The defendant, Julian Lentin, by his Answer filed May 17, 1944, denied the material allegations of the complaint. (Tr. 10-12)

On May 2, 1944 the plaintiff filed his Motion for Preliminary Injunction in which was outlined specifically the purchase by the defendant, Julian Lentin, of approximately twenty-five carloads of Mexican Ponderosa Pine from the Pan-American Trading Company of Kansas City, Missouri, and the resale of these cars between November 8, 1943 and February 4, 1944 for prices aggregating \$48,957.11 and that these sales resulted in over-charges in violation of Maximum Price Regulation No. 94 in the amount of \$16,037.11; that on or about March 25, 1944 the defendant, Julian Lentin, purchased a carload of clear and select plain red and white oak flooring and between April 1st and April 4th, 1944, he sold the carload to eight lumber yards for a total of \$4602.97 which resulted in an over-charge of \$403.95 in violation of Maximum Price Regulation No. 458; that unless the defendant was enjoined, he would continue to charge prices in excess of the maximum price established by the two above numbered regulations.

The affidavits of Richard R. Johnson and John H. Regan are attached to the Motion for Preliminary Injunction and to Mr. Johnson's affidavit there is attached Exhibit A which

...ner in which the total overcharges
purports to show the margin of the sales of Mexican Ponderosa
of \$16,037.11 arising out of the total overcharges of \$403.95
Pine were estimated, and of oak flooring were estimated.
arising out of the sale
(Tr. 14-30)

Lentin, filed his counter-affidavit
avits for Preliminary Injunction
to the Motion and Affidavit, he stated that about October 20,
on May 7, 1944 in which by the Pan-American Trading
1943 he was offered, Missouri, which was represented
Company of Kansas City company, Mexican Ponderosa Pine
to him to be a Mexican pine per M board feet, classified as
in carload lots at \$63.00 per M board feet, which pine was represented to
No. 3 Common and Better, which pine was represented to
the defendant as having been produced in Mexico and
would be imported from mills in Mexico into the United
States, for which the Pan-American Trading Company rep-
resented itself to be the selling agent. Upon receiving this
offer, the defendant, Julian Lentin, inquired of the Office of
Price Administration in Chicago and discussed with Mr.
Huntley and Mr. Burt, representatives of the Office of Price
Administration in Chicago, the legality of the proposed pur-
chase. All of the pertinent facts were stated and he was
advised by Mr. Huntley and Mr. Burt that importations
of Mexican Ponderosa Pine were not restricted by any
price regulation of the Office of Price Administration, and
that it was permissible for the defendant to purchase the
lumber at \$63.00 per M board feet. As part of the said
discussions, the attention of the defendant was referred
to a printed regulation, entitled MPR 94, Amendment 8,
dated September 20, 1943, from which regulation there
was read to the defendant statements of policy of the
Office of War Information and the Office of Price Ad-
ministration which clearly established there were no price
ceilings on purchases of Mexican Ponderosa Pine outside
of the United States and based on the said statement of

policy, the defendant was advised that he could purchase this pine at \$63.00 per M board feet or whatever price was set by the producer and seller; that the defendant was furnished with an Import Number which permitted Pan-American Trading Company to import 800,000 feet of Mexican Ponderosa Pine into the United States; that the defendant realized a profit of not more than \$3000.00, which included the cost of labor in handling and tallying the cars of lumber; that the defendant has made every effort at all times to comply with all regulations governing the purchase and sale of lumber; that regulations are numerous, voluminous, complicated, contradictory, and confusing; that this defendant has acted in good faith in all of his business transactions and that he exercised every precaution to determine in advance if the pine purchases and sales were authorized; and that the transactions complained of were due to erroneous advice given him by officials to whom the interpretation and enforcement of the regulations of the Office of Price Administration had been assigned; and that the amount stated in paragraph 2 of the Motion for Preliminary Injunction as the amount of overcharges made by this defendant is incorrect; that plaintiff was authorized to receive more for the lumber under Maximum Price Regulation No. 94 as amended than stated in the Motion for Preliminary Injunction and the affidavits supporting same; that the cars contained lumber designated as No. 3 Common and Better, which was of a much higher grade than is ordinarily sold under said designation; that No. 3 Common and Better according to the practices of the lumber trade means lumber containing a fractional proportion of "Better" and a predominant proportion of "No. 3 Common", whereas the lumber contained in the cars in question contained between 15% and 20% of No. 3 Common and the balance of No. 2 Common, No. 1 Common, D clear and C clear, and that many of the cars contained 18 to 20 foot lengths and that in some of the ship-

ments 18 and 20 foot lengths were from 25% to 40% of the entire contents of the respective cars; that the defendant was advised by the Office of Price Administration that as a private importer he was entitled to sell the Mexican Ponderosa Pine in carload lots at an increase of \$6.50 per thousand board feet over his cost in addition to all other charges, including freight and delivery from Susanville, California to the destination of each lot of Mexican Ponderosa Pine, so that the computation made in the affidavit of John H. Regan, supporting the plaintiff's Motion for Preliminary Injunction is erroneous; that with respect to the purchase and sale of the oak flooring the defendant obtained permission from the War Production Board to purchase the flooring by authorized case number which provided for the sale of the lumber in truckload lots to retail lumber dealers who had certain types of orders and certain specified priority ratings; that he is a wholesale distributor with respect to the oak flooring; that he has wholesale distribution yard facilities; that although the lumber was sold directly from the cars, this was done to prevent a useless and unnecessary waste of man power and additional expense in unloading the said lumber for distribution and storage in any of his available storage spaces and then re-loading the lumber from said spaces to trucks for distribution to the purchasers. The lumber was needed for immediate emergency use and to do this would have also involved a loss of time. (Tr. 34 to 41)

As Exhibit 1 there is attached to the counter-affidavit of Julian Lentin, Amendment 8 to MPR 94 dated September 20, 1943 of which the pertinent paragraph appears as the fourth paragraph of the Press Release, a part of and preceding the amendment (Tr. 42) which states the following:

"There are no price ceilings on purchases of Mexican pine lumber outside the United States, and both De-

fense Supplies Corporation and the private importer have been buying Mexican pine at prices close to the domestic pine ceilings for resale domestically to U. S. war agencies."

On May 27, 1944 the defendant filed an additional counter-affidavit by which he stated that as a result of the grading of three of the cars of lumber involved in the complaint the percentage of No. 3 Common pine to higher grades of pine in each of the cars was respectively 9 plus per cent of No. 3 Common, 90 plus per cent of better grades, 8 plus per cent of No. 3 Common and 91 plus per cent of better grades and 10 plus per cent of No. 3 Common and 89 plus per cent of better grades. Attached to the additional counter-affidavit of the defendant are three exhibits purporting to show that the prices charged for each of the three cars involved, based upon the actual lumber in each of the cars, was below the ceiling prices established by Maximum Price Regulation No. 94.

On May 31st the plaintiff filed the affidavits of Edwin L. Burt and Ben S. Huntley in opposition to the additional counter-affidavit of the defendant in which denial is made that the conversations between the defendant and them took place as alleged in defendant's counter-affidavit and which further state that Amendment No. 8 of MPR 94 applied only to the Defense Supplies Corporation, a government agency. (Tr. 44 to 54)

On September 25, 1944 an order was entered by which the Court reserved jurisdiction to enter a permanent injunction against all of the named defendants except Julian Lentin. The order was entered by the consent of the attorneys representing all of these defendant purchasers upon their representations that none of the violations alleged against the defendant purchasers was willful or intentional on the part of the defendant purchasers. The order reserves in the Court jurisdiction to enter a

permanent injunction upon notice in the event any violations of Maximum Price Regulation No. 94 and Maximum Price Regulation No. 458, as amended, occur after the date of the said order. (Tr. 60-61)

On December 5, 1944 the defendant, Julian Lentin, by leave of Court filed an amendment to his answer in which he stated that with respect to twelve of the other named defendants and sixteen of the cars of lumber, he acted as a factor or broker in that the said cars were delivered directly to these twelve named defendants by the Pan-American Trading Company, and that the said cars were ordered for the respective purchasers thereof and billed to the said purchasers at the importer's and seller's price therefor and that the defendant, Julian Lentin, received various sums of money from each of the purchasers of the lumber as and for his handling charges; that as to two cars of lumber specified in the complaint, the defendant was a wholesale distributor, the said cars were broken and divided among the various purchasers, and were sold at wholesale distributors' prices in conformity with all applicable price regulations. (Tr. 63-64)

On December 5, 1944 the defendant filed his Second Additional Counter-Affidavit to the Motion and Affidavits for Preliminary Injunction. The affidavit lists the sixteen cars and twelve purchasers named in the Amendment to the Answer, the amount billed by Pan-American Trading Company, the amount invoiced to the respective purchasers, and the amount of the handling charges received in each instance by this defendant. One of the said cars is alleged in the affidavit to have been sold to A. H. McGrew Lumber Company in which transaction this defendant received the sum of \$119.15 as a broker or factor at \$66.00 per thousand feet based at the time on notice that the price of the said car would be \$66.00

per thousand feet. Two cars were sold in small lots at wholesale distributor prices; that none of the transactions which are described in the affidavit as factoring or brokering transactions was a sale or purchase of lumber so as to be a basis for a charge of a violation of MPR 94 and MPR 458. (Tr. 67, 68)

The Evidence.

The issues having thus been made up by the parties, the case proceeded to trial and the plaintiff offered evidence of the transactions between the defendant and the Pan-American Trading Company, and between him and the various retail yard purchasers of lumber. Evidence was further introduced showing the prices for the lumber involved permitted under MPR 458 for oak flooring and MPR 94 for No. 3 Common and Better Mexican Ponderosa Pine of various widths and lengths, the amount of freight permitted to be charged for this lumber was offered in evidence, and under the Regulation certain additional charges were added to the prices thus arrived at as a result of which plaintiff undertook to prove that there had been an overcharge of \$22,832.97 on the sales of Mexican Ponderosa Pine and oak flooring. This sum was calculated by adding to overcharges stated in plaintiff's Exhibit 51 of \$16,126.36 on the sale of the Mexican Pine, the sum of \$244.13 on the sale of the oak flooring, and by applying, what plaintiff's attorney called the same proportion, to the pine overcharges on the 19 cars as fixed in Exhibit 51 to 9 additional cars and thus adding the sum of \$6462.48 as overcharges for the 9 cars. (Tr. 220)

The plaintiff introduced the evidence of one Charles L. Baxter to the effect that he had been offered this lumber by Pan American Trading Company at \$55.00 per M board feet, had consulted with OPA and as a result of letters

received from OPA had refused to purchase the lumber. This testimony and the letters were admitted in evidence over the objection of the defendant. (Tr. 135, 138)

The defendant, Lentin, offered to prove by the various retail yard purchasers, all of whom were among the other defendants in the case, the nature and grades of the contents of the cars purchased by each of them. Objections to this testimony were sustained by the Court. (Tr. 150 to 173 and 195 to 197)

Offers of proof that the cars, when examined by the purchasers, all of whom were qualified to grade Mexican Pine, contained a substantial proportion of lumber better than No. 3 Common and that the grades actually contained in the cars were sold within the ceiling prices established by MPR 94 and that the sale of this lumber did not tend to add to the burden or possibility of or cause any inflation were likewise rejected on objection. (Tr. 155, 162, 173, 197)

Offers of proof that the defendant, Lentin, had yard facilities for unloading and storing lumber were rejected by the Court on objection. (Tr. 157, 173, 215)

The defendant, Lentin, offered to testify to his conversation with Mr. Ben L. Huntley, Senior Business Analyst, employed in the Chicago District Office of OPA concerning the prospective purchase of this lumber at \$63.00 per M feet plus freight from the Mexican Mills, which the Court refused to allow him to do (Tr. 179, 181) but subsequently in the trial, the attorney for the plaintiff withdrew his objection to this testimony and the Court allowed it to be given (Tr. 199, 200) and thereupon the defendant testified to his conversation with Mr. Huntley in which Mr. Huntley advised him that lumber imported from Mexico was not subject to price ceilings and it could be purchased at the importer's price and that he received Amendment 8 to MPR 94 and in the Press Re-

lease, a part of this Amendment, his attention was called to a statement that confirmed this advice given him by Mr. Huntley. The defendant testified that although he stated in his affidavit that he had spoken to Mr. Burt, he had not in fact spoken to Mr. Burt but when he spoke to Mr. Huntley, Mr. Huntley consulted with other persons in the Office of Price Administration and it was his impression that Mr. Burt was one of these persons with whom he consulted. (Tr. 200-203)

The total number of cars of Mexican Ponderosa Pine handled by this defendant was 28, nine cars more than were included in the complaint, and in the affidavits in support of the Motion for Temporary Injunction. The nine additional cars were similar to the other cars handled and were handled in about the same way. (Tr. 194)

Of these 28 cars, the evidence shows that 2 were sold to numerous purchasers in small lots, and 17 were sold in carload lots. There is no evidence of the manner in which the balance of the cars were sold. In addition, the defendant handled one car of oak flooring which was also sold to numerous purchasers in small lots.

The defendant claimed that the prices charged by him for the two cars of pine sold in small lots and the car of oak flooring were within the ceilings established by MPR 94 and MPR 458 for wholesale distribution yard sales.

The plaintiff was granted leave to amend his complaint by adding to the amount of treble damages claimed, an additional \$30,000, making the total claimed \$90,000.00. (Tr. 147)

The defendant proved that he was charged \$63.00 per M board feet for the pine lumber and that he charged the retail yard purchasers \$63.00 per M board feet for the pine lumber in carload lots, plus \$3.00 and on three carloads \$4.00 per M board feet for handling. In the

case of one car the price charged was \$66.00 per thousand board feet because he had been advised that that was to be the price of this car. His gross profit on the original 19 cars was less than \$2400.00 (Defendant's Exhibit 2, Tr. 189) and less than \$3000.00 on the entire 28 cars of pine lumber.

After the close of all the testimony, the Court accepted the plaintiff's statement that he proved overcharges on the cars of Mexican pine and oak flooring in the sum of \$22,832.97. The Court accepted the plaintiff's suggestion that by applying the same proportion to the additional nine cars that had been applied to the original nineteen cars, the amount of overcharges were thereby fixed at \$6462.48 for the additional nine cars. (Tr. 220) No proof was offered by the plaintiff of the contents, the actual grades, the amount paid, and the amount per carload or per smaller quantity for which any of the lumber in these nine cars was sold. On the basis of the testimony and the suggestion of the plaintiff, the Court found that a total of \$22,832.97 was the amount of overcharges, and on the basis of this figure, entered a judgment for \$45,665.94 and costs, which is double this amount, and also entered a permanent injunction against this defendant. (Tr. 255)

Motion for a new trial was heard and overruled. (Tr. 258)

The Contested Issues.

The Contested Issues involved in this appeal are:

1. The Trial Court, by his numerous remarks made during the course of the trial, intimated prejudice and bias inconsistent with a fair trial, and made it impossible for the defendant to convince the Court of his good faith and of his having taken practical precautions to avoid the violation of the regulations.

2. The Court erroneously entered a judgment for damages against this defendant, since the plaintiff was estopped from seeking damages against this defendant by the conduct of an official of the Office of Price Administration, and by the language of an official document of the Office of Price Administration.

3. The Court erroneously refused to permit the defendant to show that he was acting only as a broker or factor as to most of the cars purchased in behalf of the other defendants.

4. The Court erroneously sustained objections to testimony offered to establish the defendant's good faith.

5. The Court erroneously allowed the plaintiff a judgment based upon \$6462.48 in alleged overcharges without any proof in the record to establish such overcharges.

6. The Court erroneously entered a judgment for an amount in excess of the actual single damages proved.

7. The Court erroneously failed to give the defendant credit for an item of \$2.00 per M board feet on each of the cars by reason of the cars containing 18 and 20 foot lengths, as provided for in MPR 94.

8. The Court erroneously admitted and considered the testimony of Charles L. Baxter with reference to his experience with the Office of Price Administration in connection with the proposed purchase of lumber from the Pan American Trading Company.

9. The Court erroneously refused to allow the defendant to prove that he had yard facilities in which to unload and store, and from which to sell lumber in less than carload lots at prices fixed by MPR 94 and MPR 458 for distribution yard sales in less than carload lots.

10. The Court erroneously refused to permit defendant to prove the actual contents of the cars of Mexican

Pine and the maximum prices at which these cars, based upon actual contents, could be sold under the applicable regulations.

11. The Court erroneously entered an injunction against this defendant without proof of the likelihood of violations in the future.

PROPOSITIONS OF LAW RELIED ON.

I.

The comments of the Trial Court during the trial, indicate bias and prejudice against the defendant and are inconsistent with the calm and deliberate consideration of evidence and judicial impartiality consonant with principles of justice and due process of law.

Mason v. United States, 63 Fed. (2d) 791.

National Labor Relations Board v. Air Associates,
121 Fed. (2d) 588.

II.

Plaintiff was estopped from recovering any damages against the defendant by the facts and circumstances of this case.

Walker v. United States, 139 Fed. 409.

The Siren, 7 Wall. 159.

People v. Bradford, 372 Ill. 63.

Amendment 8 to Maximum Price Regulation 94.

III.

Evidence excluded by the Court tending to establish that the defendant's relation to retail purchasers of full car-load lots of lumber was that of a factor or broker, prevented the defendant from establishing the basis for a finding that as a factor or broker and not as a seller, the defendant was not subject to the damage provisions of Section 205(e) of the Emergency Price Control Act of 1942 as amended.

(See Argument.)

IV.

The judgment for more than single damages was erroneous, in view of the failure and refusal of the Trial Court to properly consider defendant's evidence and offers of proof tending to establish lack of wilfulness to violate the regulations and the taking of practical precautions by the defendant against the occurrence of the violation.

(See Argument.)

V.

The Trial Court erroneously considered improper and wholly inadequate testimony as to overcharges in the sale of nine cars of lumber and improperly entered judgment for \$12,924.96 as a part of the total judgment of \$45,664.94 without proof to support the first above stated damages.

(See Argument.)

VI.

The evidence and exhibits of Charles L. Baxter received over the objection of the defendant were improperly received and were prejudicial.

Corpus Juris Secundum, Vol. 32, Sec. 576, page 432.

General Motors Corp. v. Blackmore, 53 Fed. (2d) 725.

Wigmore on Evidence, 3rd Ed. Vol. 2, Sec. 377, page 310.

VII.

The Court's refusal to allow defendant and his witnesses to testify to the defendant's distribution yard facilities and to the defendant's knowledge of the grades and qualities of the lumber was improper.

(See Argument.)

VIII.

Defendant was improperly denied credit for specified 16, 18, and 20 foot lengths, 4 and 6 inch widths, as provided in Maximum Price Regulation 94.

(See Argument.)

IX.

The permanent injunction entered against this defendant was improperly entered in the absence of proof of the likelihood that the offense will recur.

The Hecht Company v. Bowles, etc., 321 U. S. 321.

Shore v. United States, 282 Fed. 857.

Walling v. T. Buettner & Co., 133 Fed. (2d) 306.

ARGUMENT.

I.

The comments of the Trial Court during the trial, indicate bias and prejudice against the defendant and are inconsistent with the calm and deliberate consideration of evidence and judicial impartiality consonant with principles of justice and due process of law.

The record shows that throughout the trial, the Trial Court made statements of his opinion of the defendant as a violator of OPA regulations which indicated a prejudiced and biased attitude toward him and which we contend prevented the defendant from receiving a fair trial.

We first call attention generally to the Court's impatience with any attempt made by the defendant to offer evidence on the question of good faith, and to the exclusion of all such offers of proof. The defendant called as his witnesses a number of owners of the retail yards to whom the lumber was sold for the purpose of establishing the actual quality of the lumber when examined and graded by these purchasers (Tr. 153-155, 162, 169, 173, 177-191, 197) and offered for sale to the consumers. (These purchasers were among the defendants in this case who were not penalized for their part in these transactions by the decree of September 25, 1944. No injunction as prayed in the complaint was entered against them. The Court's decree allowed them to say they did not act wilfully and reserved jurisdiction to enjoin them, on notice, if they should violate the regulations in the future.

(Tr. 59-61) All such testimony was excluded and the defendant's offer of proof that this testimony would establish that the actual grades contained in the cars were such that the public was enabled to purchase this lumber at prices within the price ceilings, was likewise excluded on objection. (Tr. 154) We contend that the exclusion of the testimony contained in these offers of proof on the ground that the regulations did not allow the defendant to show actual grades when the lumber was invoiced in a combination grade, was erroneous. The evidence and offers of proof were pertinent to the question of lack of wilfulness because if the defendant, who was, in the first instance, told that imported lumber was not subject to price ceilings, knew, after the first car was examined that the lumber was of such a quality that the retailer could handle it at a profit within price ceilings for the various grades, lengths, and widths, proof of this knowledge was proper evidence to show that he was acting in good faith.

If the contrary were true it would have been proper evidence to show wilfulness. The Court considered this defendant as a particularly serious violator of the law. It was the Court's stated opinion that this defendant was (1) a person who deliberately dodged the regulations (Tr. 231); (2) who by marking his invoices to show invoiced to retail purchasers at a price, and charging an additional sum for handling the lumber, was thereby covering up his guilt by attempting to show that he was a broker (Tr. 190); (3) who had mulcted the public of \$16,000.00 for the sake of making a profit of \$2400.00 (Tr. 189); (4) who was particularly guilty of trying to evade the regulations because he conspired with officials of OPA (Tr. 179); and (5) who was one of the worst cases of violation of OPA regulations that had ever been presented before him. (Tr. 230)

We contend that none of these remarks and the characterizations of the defendant contained in them were justified by any evidence in the case. The Court refused to allow the defendant to show what the public paid for the lumber and whether or not these prices were, as the defendant contended, within the retail price ceilings (Tr. 154), and there is nothing in the record upon which the Court could have based his characterization that the defendant was a black market operator. (Tr. 229) The language employed by the Court seems to indicate that the Court was generally prejudiced against defendants in OPA cases.

There is likewise no justification for the Court's characterization of this defendant because invoices made at the time of the various sales to retail yards revealed the price to the retail yard and an additional item for handling charges, that the defendant was thereby seeking to cover up illegal transactions by establishing his relationship with the retail yards as a broker or factor for them and thereby seeking to avoid liability for violation of the regulations. (Tr. 190) The invoices, which are in evidence as Plaintiff's Exhibits, reflect exactly how the lumber was handled between the defendant, the Pan American Trading Company, the shipper, and the retail yards, and there is no evidence to support the Court's statement that the defendant designed them to "cover up."

The statement of the Court that this defendant had "taken every dodge that has been used in every case before me to escape liability" (Tr. 231) is further evidence of the fact that the defendant did not receive a fair trial. We believe that it is error for a Court to possess an attitude that a defendant who presents whatever defenses he may have is thereby resorting to "dodges" and that because of this attitude this defendant could not and did not receive a fair trial.

The Court believed that the defendant caused the public to be mulcted out of a large sum of money (Tr. 189) and for this characterization as for all of the others, there is not the slightest support in the evidence. The attempt made to show that the public paid ceiling prices or under for this lumber was denied the defendant and there is nothing else in the record to justify this biased and prejudiced statement by the Trial Court.

Finally, we find no reason for the Court's belief that this was one of the worst cases of OPA violation that had ever been presented to him. This attitude evidences a refusal of the Court to consider any evidence that may have been favorable to the defendant. It is inconsistent with a fair trial.

We urge, that if in a trial by a jury any of the above attitudes could be shown to have been held by members of that jury, a verdict against the defendant by that jury would be reversed on the ground of prejudice. We can see no distinction between a prejudiced jury and a prejudiced Trial Court as it affects the right of a defendant to a fair and impartial trial.

The case of *Mason v. United States*, 63 Fed. (2d) 791 resulted in a reversal of the Trial Court's judgment because of prejudicial remarks made by the Trial Court during the course of the trial in the presence of the jury. We cite this case, not because of any similarity between it and the case at bar, but simply to point it out as an instance in which the remarks of a Court during the trial may so prejudice a defendant as to require a reversal on that ground.

In the case of *National Labor Relations Board v. Air Associates*, 121 Fed. (2d) 588, 590, the Court states:

"It is conceivable that even in a trial before a judge without a jury the conduct of the judge might

be so unfair as to give rise to sufficient inference of a prejudice in his findings to warrant a reversal of a judgment entered by him."

We have been unable to find cases which are similar to the case at bar on this point. We recognize that the facts of each case must determine whether the alleged prejudicial remarks were of such a nature as to prevent the defendant from receiving a fair trial, and it is our contention that in this case the remarks and attitude of the Trial Judge, unwarranted by any evidence in the record, and in themselves of a highly prejudicial nature, prevented the defendant from receiving a calm and deliberate consideration of the evidence and requires a reversal of the judgment.

II.

Plaintiff was estopped from recovering any damages against the defendant by the facts and circumstances of this case.

The defendant testified that the Office of Price Administration, through an official placed in a position and given authority to speak for the Administrator, with whom the defendant consulted, advised the defendant that it was permissible for him to engage in a transaction involving the purchase of imported lumber without violating OPA regulations, since lumber imported from Mexico, according to the official's advice, was not subject to American price ceilings. Based upon this information, the defendant ordered the carloads of Mexican Ponderosa Pine involved in this proceeding. There are no facts, either in the evidence or that may be implied from any evidence from which it may be said that the defendant had any intention to profit, or actually profited, in any sum that represented the difference between the prices paid for this

lumber and the ceiling prices the plaintiff now contends apply to the sale of this lumber.

On the basis of the plaintiff's calculation of profits, this would mean that the defendant would have profited on this transaction to the extent of approximately \$22,000. The undisputed fact is that he made a profit of approximately \$100.00 on each carload of lumber or about \$3,000.00 on the entire transaction, and this amount included certain handling charges and was not his net profit.

Nevertheless the Office of Price Administration instituted an action for triple damages against this defendant based upon an alleged overcharge of \$30,000.00. No consideration is given to the fact that the defendant from the very beginning could, under no circumstances, have intended to profit in excess of \$3,000.00 and that the actual result of the transaction was a profit to the defendant of less than \$3,000.00.

The attorney for OPA made a statement to the Court that this defendant was barely distinguishable from a criminal, and the Court stated that this was one of the worst cases ever presented before it. The defendant's plea that he inquired if the purchase could be made at the quoted price and was told that it was permissible without violating the regulations and in support of the advice he received from OPA, a printed copy of Amendment 8 to MPR 94 which appeared to support the advice that imported lumber was not subject to price ceilings, was met by the brusque statement of the Court that the defendant could not rely on what he was told by OPA representatives since OPA representatives could not bind the United States (Tr. 179) and that OPA press releases were of no force whatsoever (Tr. 127), and the Court suggested that the defendant was the worst kind of violator because he inquired of OPA before he bought the lumber (Tr. 179), which the Court implied was merely proof of

his cunning and established that he was making inquiries to cover his bad faith.

It did not seem to occur to OPA or to the Court that such treatment of citizens makes no moral or social sense. In the context of democratic forms and methods, it is the worst and most cynical kind of oppression. There is and must be no reason why a citizen cannot rely upon the advice of a representative of a government agency given in answer to specific questions, and why this advice sought and received in good faith is not a complete defense to a suit for triple or any damages. The Office of Price Administration, under these circumstances, should be estopped from claiming damages on behalf of anyone, including the United States, when by its advice it induces a citizen to act in a certain manner, and the acts of the citizen do not reflect that he profited by following the advice to the extent of substantially the excess amount involved, and the acts did not involve a result contrary to the purposes of the Price Control Act and the regulations issued thereunder.

We contend this, with due recognition of the fact that it has been held that the giving of judgment for at least single damages, where violations of price regulations are shown, is not subject to the discretion of the Court. We argue that the language of Section 205 (e) of the Emergency Price Control Act of 1942 does not abrogate the defense of estoppel when it exists, and that in this case both the evidence of conversations, the language of the Press Release of Amendment 8 of MPR 94, and the circumstances of the transactions for identical prices plus a nominal charge of approximately \$100.00 per car for handling the lumber, support the defense of estoppel.

The result in this case is otherwise grotesque and unconscionable.

It is apparent in this case, although the Court afterwards, upon the voluntary withdrawal of plaintiff's objection to evidence offered, heard evidence of conversations with Mr. Huntley, Senior Business Analyst of the Office of Price Administration, (which conversations Mr. Huntley did not remember) that the conclusion of the Court with respect to the effect of these conversation upon the defendant's conduct was not based upon the resolution of the seeming conflict in the evidence as to the conversations, in favor of the plaintiff, but on the ground that this evidence did not matter—"It was not binding on the United States."

We contend that if the Court should omit from its consideration conversations conveniently forgotten by Mr. Huntley, the language of the Press Release, part of Amendment 8 of MPR 94, and its calculable effect upon the citizen who reads it, not with the sharpened eye of the lawyer, but with the simple understanding of the layman, creates an estoppel which is a complete defense to the claim for damages in this case.

We further contend that it is against the current of American jurisprudence to announce and enforce a principle of damages to which there is no defense. Objections in this regard have been overruled by the courts in recent cases, without considering the inherent harm that lies in travelling along this dangerous road. It is a rigid principle. Safety and justice have always demanded and still require flexibility in the consideration of recognized defenses. To say that damages must be allowed by a Court if a violation of regulations is shown by proof of prices in excess of ceilings, is to say that there can be no circumstances which would, at least, prevent the plaintiff from categorically asserting that, there being a violation, there must be at least single damages. If this were true, there could be no defense of

estoppel or entrapment, to state but two possible defenses that have always been recognized as indispensable to the safeguarding of the rights of citizens.

We urge a modification of the type of legal thinking that will discard these ancient defenses. We urge the Court that in this case, the circumstances constitute a complete defense to the action. The Office of Price Administration, by the action of its official, made the violation possible. The circumstances show that but for the plaintiff's action, the defendant would not have committed the violation. The evidence shows beyond dispute that the defendant did not profit by reason of the violation to an extent which indicates that profit was the motive for the violation.

We are aware that the doctrine of *estoppel in pais* against the United States or an administrative agency of the United States has been reluctantly invoked by the Courts and in most cases denied. Yet there runs through all these cases the reservation either expressed or implied that in a proper case it may be enforced against the sovereign.

The case of *Walker v. United States*, 139 Fed. 409 affirmed by the Circuit Court of Appeals in 148 Fed. 1022 involved a question of whether by a course of conduct in paying certain claims of a United States Marshal, the United States was estopped from seeking to recover payments so made, which were conceded to have been illegally made, by way of a counterclaim. The following is the language of the decision:

"After much deliberation the Court has reached the conclusion, whatever may be the general rule, that under the facts of this case the United States stands as to its counter-claim upon no better footing than would a private citizen, though doubtless it may recover money paid under mistake of law by its officers.

It is conceded that the money the Government now seeks to recover by its counter-claim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents; that it cannot be estopped by the unauthorized acts of its accounting officers; that it is not subject to the Statute of Limitations, and that the unauthorized acts of its agents never bind the sovereign. It is, however, equally true when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound as an individual would be by his own acts or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them."

In the case of *The Siren*, 7 Wall. 159, 19 L. Ed. 129, the Supreme Court of the United States held as follows:

"The underlying principle of all the decisions is that when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority and is under duty to withhold relief to the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum, in like subject matter between man and man. Acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, may, in a proper case, work an estoppel against the Government."

The Supreme Court of Illinois, in the case of *People v. Bradford*, 372 Ill. 63, 74, held as follows:

"The rule adopted in Federal Courts as applied to the Government of the United States or the States concerning the matter of estoppel and the position which the Government occupies before the courts in a suit brought by it, have been well discussed and considered in *Walker v. United States*, 139 Fed. 409,

Linsay v. Hawes, *supra*, (2 Black (U.S.) 554), *Sinking Fund* cases in 99 U. S. 719, 25 L. Ed. 496, and *United States v. Bank of Metropolis*, 15 Pet. 392, 10 L. Ed. 774, wherein the rule is adopted that the Government, when proceeding in court against the citizen stands upon no better footing than would a private citizen, even though the suit relates to the collection of its revenues."

There are a number of recent cases in which the various Circuit Courts of Appeals have held that the United States is not bound by advice or information given by officials of the various administrative bodies. The reading of these cases does not indicate that the rule announced above has been changed. For the rule provides that the doctrine of estoppel is applicable to the United States by reason of any acts of officials of the United States acting in the performance of their duty under circumstances which require the application of the doctrine in order to deal justly with the citizen.

The statement of the rule does not deprive the United States of all the privileges due the sovereign in proper cases so that the sovereign is not bound by statutes of limitation, or by unauthorized acts of officials, or precluded from recovering money paid under mistake of law by its officers. Granting these privileges to the sovereign does not, however, deprive the citizen of the right in proper cases to invoke the doctrine of estoppel where justice demands that he have the protection of this doctrine.

In the case of *Walker v. United States*, 139 Fed. 409, the Marshall was held both by the District Court and the Circuit Court of Appeals to be entitled to invoke the doctrine of estoppel against the United States when the United States sought to recover back moneys paid to the Marshall which he had distributed, although it was conceded that this money had been illegally paid.

The defendant testified that after his conversation with Mr. Huntley, in which Mr. Huntley advised him that imported lumber was not subject to American price ceilings and could be purchased without regard to regulations, he received Amendment 8 to MPR 94 (a copy of which appears in Tr. 42-43). The fourth paragraph of the Press Release which is a part of the Amendment reads as follows:

"There are no price ceilings on purchases of Mexican pine lumber outside the United States, and both Defense Supplies Corporation and the private importer have been buying Mexican pine at prices close to the domestic pine ceilings for resale domestically to U. S. war agencies." (Tr. 42).

The matter of the language of the Press Release was dismissed by the attorney for OPA by stating that the Amendment applied only to Defense Supplies Corporation, which is a government agency, and not to any private purchasers, and by the Court's characterization of the Press Release as being of no binding effect.

We are nevertheless concerned with a printed document prepared and issued by the Office of Price Administration, a government agency, and with the effect upon a business man to whom this document is given. We are concerned with the effect upon this business man of the above quoted language. Language which does not confine itself to the Defense Supplies Corporation but which also points out that private importers have been buying Mexican pine at prices close to the domestic price ceilings on which Mexican pine lumber, outside the United States, there are no price ceilings. We are concerned with a regulation which is so complicated that a number of controversies arose between the lawyers and the Court in the trial of this case as to the meaning of many of the sections of the regulation. The purchase of the lumber in contro-

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versy was made after the defendant had read what appears to state that for all purposes and for any persons, there are no price ceilings on purchases of Mexican pine lumber outside of the United States. The defendant was contemplating handling lumber from Mexican mills to be shipped from these mills to the United States. It was undoubtedly the kind of a transaction that OPA itself stated on September 20, 1943 before the purchases were made, was not subject to price ceilings.

The language of this paragraph in the Press Release could have, and undoubtedly did, mislead Mr. Huntley himself, who in turn, as the defendant testified, advised the defendant, based upon this unqualified statement in a document issued by the agency with which Mr. Huntley was connected. We believe it to be beside the point that this language was a part of a Press Release and not incorporated in the Amendment itself since this is undoubtedly a distinction we cannot expect the private citizen to draw. We likewise believe it to be beside the point that the Amendment itself applies only to the Defense Supplies Corporation, since the language that the defendant depended upon includes the private importer as well. We believe it to be an important point that the defendant was induced to handle this lumber at \$63.00 per thousand board feet because Mr. Huntley told him he could do so, and because the OPA supported Mr. Huntley in his opinion by the language appearing in Amendment 8 to MPR 94.

The defendant ordered this lumber because the demand for this lumber was very great and the supply in the United States was very limited. (Tr. 101) The lumber, the record shows, was so satisfactory that a number of the retail yards reordered additional cars. In no instance of carload lot sales except one, was the lumber invoiced, nor did the defendant receive from his retail pur-

chasers more than the price he paid to the Pan American Trading Company. The one instance was invoiced at \$66.00 per M.B.M. when the defendant was advised the price of that car would be \$66.00 per M.B.M. He added what was less than an ordinary and nominal profit to each of the cars, which for all 28 cars did not exceed \$3000.00. The only explanation for entering into this transaction is that the transaction was permissible because OPA and Mr. Huntley of OPA stated that importations of Mexican pine were not subject to price ceilings and because the language of the Press Release which was issued as a part of Amendment 8 of MPR 94 induced the defendant to believe that a markup of \$6.50 per MBM was permissible and defendant's handling charges of \$3.00 and in three instances of \$4.00 per MBM were well within the \$6.50 markup. The language referred to reads as follows:

"Permission to sell Mexican pine at prices \$6.50 per thousand board feet above Western pine ceiling is granted in Amendment No. 8 to Maximum Price Regulation No. 94 and becomes effective September 25, 1943." (Tr. 42)

This is a proper case for the application of the doctrine of estoppel for the reasons, that the damages provisions of the Emergency Price Control Act of 1942 as amended are still so inflexible that injustice may arise, and in this case has arisen, under them. A statute which gives a Court no power to assess less than single damages or the minimum amount stated in the statute for violations committed in good faith and with practical precautions to avoid violations, merely by showing an overcharge admits of innumerable circumstances that may make enforcement oppressive. The circumstances demand that a citizen who can show violations of the regulations induced by the advice of a representative of an administrative agency and who can further show that the

violation did not result in a large profit directly related to the overcharges and that there never was any intention of profiting to the extent of the overcharges, and that the violation did not result in a condition sought to be prevented by the Price Control Act, should not be oppressed by being assessed approximately \$46,000.00 for a transaction in which his profit was less than \$3,000.

III.

Evidence excluded by the Court tending to establish that the defendant's relation to retail purchasers of full car-load lots of lumber was that of a factor or broker, prevented the defendant from establishing the basis for a finding that as a factor or broker and not as a seller, the defendant was not subject to the damage provisions of Section 205(e) of the Emergency Price Control Act of 1942 as amended.

Section 205 (e) of the Emergency Price Control Act of 1942 as amended provides for the recovery of damages for violation of the Act and the regulations issued pursuant to the Act. Its language is as follows:

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount

not less than \$25 nor more than \$50. as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Only sellers are made the subject of its provisions for damages. Buyers, although mentioned in this section of the Act, are not named as persons who are subject to actions for damages under this section of the Act. No mention is made of any other handlers of goods and such handlers of goods, including factors or brokers, are by

reason of their omission as parties who may be sued for damages, not liable under this section.

On December 5, 1944 the defendant, Lentin, by leave of court, filed an amendment to his Answer, the purpose of which was to present as an additional defense that the defendant, Lentin, as to 16 of the original 19 cars included in plaintiff's Exhibit 51, was a factor or broker and not a seller and not liable under Section 205 (e) of the Emergency Price Control Act of 1942 as amended.

In the trial of this case the Trial Court not only refused to consider evidence offered by the defendant, Lentin, tending to establish this defense, but as pointed out elsewhere in this brief, stated that the defendant was trying to "cover up" the transactions by calling himself a broker. The Court held that the defendant, Lentin, bought the goods; he would therefore not be allowed to testify or present the testimony of other witnesses to establish any arrangement that was made with the other defendants that might show that they ordered the defendant, Lentin, to buy the carloads of lumber for them on their specific orders and the defendant, Lentin, did not act as the seller of these carloads of lumber. (Tr. 190)

The witness, Hinojosa, proprietor of Pan American Trading Company, the shipper of all the pine involved, was not permitted to testify that the defendant ordered the cars out car by car at the request of particular purchasers on the order of each particular purchaser (Tr. 211), nor were the defendant and other witnesses permitted to state that each purchaser knew the prices, had seen other cars and knew how the lumber would grade, knew he could resell to the consumer within permitted ceilings at a profit and all the other conditions surrounding the transaction.

Plaintiff's Exhibit 6 is an invoice of Pan-American Trading Company to Elmont Lumber Company for 29806-2/3 feet of Mexican Ponderosa Pine at \$63.00 per

MBM, \$1877.82. Plaintiff's Exhibit 6-A is an invoice from defendant, Lentin, to Elmont Lumber Company for the same lumber, at the same rate, and for the same total price. Plaintiff's Exhibit 6-B is an invoice from the defendant, Lentin, to Elmont Lumber Company for one lot of pine lumber, 29806-2/3 feet at \$3.00 per MBM, \$89.42.

The car of lumber involved in these exhibits was shipped to Chicago for the Elmont Lumber Company. The price charged Elmont Lumber Company is Pan-American Trading Company's price of \$63.00 per MBM and the defendant, Lentin, charged Elmont Lumber Company \$3.00 per MBM for handling the lumber.

Plaintiff's Exhibit 14-B describes this item charged to Lippman Lumber Company as "unloading, tally and handling charges". Exhibits 19-A and 21-A also describe these charges as "handling" and "handling charges". The foregoing Exhibits show the manner in which all carload sales were handled by the defendant Lentin. In all sales in carload lots the exhibits show an invoice for the lumber at the price charged by Pan-American Trading Company, and an invoice for \$3.00 or in three instances for \$4.00, per MBM by the defendant, Lentin, for handling.

The invoices made at the time of the transactions do not reflect what is the common purchase and sale, in which case there need be only one invoice between the defendant, Lentin, and his retail yard customer in which Lentin's price would be stated to include his profit. The making of the invoice to the retail yard purchaser at the importer's price and another invoice for handling charges is beyond doubt a departure from the common sales transaction. It may be the basis for a factoring transaction and if the defendant had been permitted by the Trial Court to introduce evidence excluded tending to establish this relationship, the defendant would not have been improperly precluded from having the advantage

of evidence in the record from which it could be established that as to all, or a major portion of cars sold as full carloads of lumber, the defendant was not the seller, but was a factor, and as such was not liable for damages under Section 205 (e) of the Emergency Price Control Act of 1942 as amended.

IV.

The judgment for more than single damages was erroneous, in view of the failure and refusal of the Trial Court to properly consider defendant's evidence and offers of proof tending to establish lack of wilfulness to violate the regulations and the taking of practical precautions by the defendant against the occurrence of the violation.

Section 205 (e) of the Emergency Price Control Act of 1942 was amended on June 30, 1944, and by its amendment it became permissible for the first time for the Trial Court to consider elements of the defendant's lack of wilfulness to violate applicable price regulations, and whether or not the defendant failed to take practical precautions to avoid violations for the purpose of determining if more than single damages should be assessed against defendant.

The defendant offered to testify to a conversation with Mr. Ben S. Huntley, the Senior Business Specialist, employed in the Office of Price Administration in Chicago. When this testimony was first offered, the Court refused to permit the defendant to testify and stated: "I don't care—objection sustained. You know that the United States cannot be bound by talks with the Office of Price Administration, with District Attorneys, or with anybody else". (Tr. 179)

This observation by the Court was followed by this statement: "The worst violator is the man who goes

around and has these conversations. He is trying to figure some loop-hole". (Tr. 179)

On page 178 of the Transcript the Trial Judge stated that many defendants had tried to show that products which they were charged with selling above established prices for certain grades, were in fact of higher grades, and could be sold for higher prices without violating the regulations; that these defendants had not gotten away with it.

Later in the trial (Tr. 199-200) the attorney for the plaintiff suggested to the Court that it might be error to persist in refusing to allow the defendant to testify to conversations with OPA officials, which the defendant contended misled him, in view of the amendment to Section 205 (e) of the Emergency Price Control Act of 1942. This testimony, it was suggested, might establish lack of wilfulness, and the taking of practical precautions to avoid violations, and upon the voluntary withdrawal of his objection to this testimony, the Trial Court permitted the defendant to testify to his conversation with Mr. Hunley of OPA.

The defendant thereupon testified that, prior to the shipping of this lumber by the Pan American Trading Company, he telephoned to OPA and had a telephone conversation with Mr. Huntley, who, during the conversation consulted with other persons in the office among whom, the defendant thought, was Mr. Burt, and that Mr. Huntley advised him that imported Mexican pine was not subject to price ceilings, and that he received from OPA a copy of Amendment No. 8 to MPR 94 in which, as a part of Press Release, it was stated that imported lumber was not subject to price ceilings.

Mr. Huntley denied that he so advised the defendant. He remembered talking to the defendant sometime after

the suit was started (Tr. 218) and to some one about Mexican pine before that time, but he did not remember talking to the defendant and he never told anyone that Mexican pine was not subject to the regulation.

In the face of the Court's stated impatience and displeasure with all persons who seek advice from OPA, what possible value could this testimony of conversations have had to sustain even the partial defense to more than single damages that Section 205 (e), as amended, permitted?

If, in the Trial Court's mind, a defendant who consults with OPA and seeks advice concerning a contemplated transaction is the worst violator by reason of doing these very things, then certainly the Court could not have given the defendant any of the consideration that this testimony would otherwise entitle him to, and in this connection, we do not believe it made any difference whether or not Mr. Huntley remembered the conversation, or whether he did or did not advise anyone that purchases of imported lumber were subject to price ceilings.

When a copy of Amendment No. 8 to MPR 94 was handed to the Court to be read, the record discloses that the Court refused to consider language appearing in the printed OPA document because it was part of the Press Release and not of the amendment and therefore of no value as evidence (Tr. 127). The Press Release is undoubtedly a part of the document issued by the Office of Price Administration. There is no indication in the document that any part is to be read and understood and relied upon in a manner different from any other part. The defendant is not a lawyer. The circulation of the document is not confined to lawyers by the Office of Price Administration, and for the purpose of establishing if the defendant did or did not wilfully violate the regulations, or did or did not fail to take practical precautions not to violate them, the

manner in which the Court treated this offered evidence is clearly in violation of the defendant's rights and failed to give the defendant the benefit of a defense to which, under the statute as amended, he was clearly entitled.

The language depended upon in this Press Release stated: "There are no price ceilings on the purchase of Mexican pine lumber outside the United States." (Tr. 42) This language seems to be plain and simple and anyone relying upon it to mean what it says should, we believe, be given the benefit of the effect that this document would have on the reasonably intelligent business man. Whether or not Press Releases are binding and whether or not Amendment No. 8 is applicable only to the Defense Materials Corporation, seems to us to be completely beside the point under the circumstances surrounding the defendant's inquiry and the information he testified he received in reply to his inquiry about his proposed handling of imported Mexican pine. The only question the Court should have considered upon the offer of this testimony was: was defendant misled by the unequivocal printed statement in the official document he received in connection with advice he was given by an official of OPA to believe that he could handle this lumber free from the price restrictions of MPR 94. If he was led to believe this, he could not have wilfully violated the regulations, and if he inquired about whether or not he could order the lumber, his inquiry establishes that he took practical precautions not to violate the regulations.

Under the circumstances any damages in excess of single damages is the result of a refusal and failure by the Trial Court to consider and give effect to evidence of good faith and the taking of practical precautions to which the defendant was entitled.

In the face of all the indignation expressed by the Court, and the Court's suspicion that the defendant was a deliber-

ate violator by reason of his having made inquiries of OPA so that this case became "one of the worst cases the Trial Court had before it" (Tr. 230), we request that the Court note that the lumber was handled in carload lots to retail yards for the importer's price plus a modest handling charge. The total of the handling charges for all the cars involved does not exceed \$2400.00 on the original 19 cars (Def. Ex. 2, Tr. 189) and not to exceed \$3000 on all the cars. This sum was his total gross profit for handling 28 cars of lumber involving a gross value of over \$60,000.00. His net profit was this sum less his cost for labor in handling the lumber.

This man is, however characterized by the Trial Court as being the worst violator who ever appeared in OPA cases before him. We venture to state that the present case is unique in that all other "lesser" violators pocketed the overcharge. If this defendant bore a resemblance to other defendants before the Court, he would have been shown to have profited to the extent of approximately \$23,000.00 and not to less than \$3000.00.

On page 229 of the Transcript the Court characterized this defendant as a black market operator. We believe this was evidence of the Court's prejudiced attitude toward the defendant and we further believe that there is no justification whatsoever in the record for this characterization.

What, consistent with good business and good economic sense, did happen in this case? In 1943 lumber, and particularly pine lumber, was scarce in the United States. (Tr. 101) The retail yards, customers of the defendant, needed pine to fill orders, many of which were directly involved in the war effort, and could find no source of supply for such lumber. This source, from outside the United States, was brought to the defendant's attention and the price asked for the lumber, \$63.00 per M board

feet, was above American ceilings for No. 3 Common and Better. The defendant asked OPA if the lumber could be bought at this price and OPA advised him that imported lumber was not subject to price ceilings and that it could be bought at this price. The defendant found support for this conclusion in the language of the Press Release, part of Amendment No. 8 to MPR 94 which was subsequently called to his attention.

He, thereupon, ordered the lumber at \$63.00 per M board feet and delivered the lumber to his retail yard customers at exactly the same price in carload lots, plus a modest charge for handling, after a full discussion with each of his customers and at their special request. The retailers, after checking the contents of the cars, requested additional lumber at the price. (Tr. 187) It may be assumed that they could handle the lumber without violating price ceilings to the consumers because the lumber graded out exceptionally well and the ceilings for the various grades in each car of No. 3 Common and Better made it possible for them to sell the lumber profitably and within the ceilings. This assumption finds ample support in the facts that none of the retail yard defendants was sued for damages in this action (Tr. 3, 9) and that by the decree of September 25, 1944 no injunction was entered against them. (Tr. 59, 61)

The defendant's handling of this lumber was not to make an unconscionable profit and did not result in one. It was not to deliver the lumber to anyone except reputable dealers who, in turn, bought the lumber because its quality enabled them to sell profitably but within price ceilings. There is no evidence whatsoever that this was a black market transaction or that the lumber found its way into a black market. The defendant was getting lumber into the American market which was suffering an acute shortage of this commodity and took no advantage of his bargaining position.

We wish to observe, in this connection, that inflation, the prevention of which is the central object of the Emergency Price Control Act of 1942, and the regulations under it, is a two-headed monster. One head represents a scarcity of goods and the other an abundance of money seeking to buy those goods. Its growth is caused by the cross-forces exerted by the abundance and the scarcity on each other. The Court, in the absence of his obvious prejudice against this defendant, could have found, without difficulty, that the purpose and intent of this defendant in handling this lumber was to make available to his customers and to the American economy in general nearly a million feet of Mexican produced lumber which might otherwise have stayed out of our market, and it can be said that its being kept out of our market, thereby aggravating the scarcity to that extent, would have had a more profound inflationary effect on our economy than anything the defendant did in connection with this transaction.

V.

The Trial Court erroneously considered improper and wholly inadequate testimony as to overcharges in the sale of nine cars of lumber and improperly entered judgment for \$12,924.96 as a part of the total judgment of \$45,664.94 without proof to support the first above stated damages.

Plaintiff's Exhibit 51, is an elaborate chart prepared by the plaintiff, from which he requested that the Court determine the amount of overcharges for 19 cars of pine lumber and 1 car of oak flooring. During the course of the trial, the plaintiff established that the defendant had handled 9 additional cars of pine lumber. In answer to questions, the defendant testified that while he did not check the data with respect to the 9 cars, he supposed

that they were sold exactly the same way as the 19 cars that were covered in the chart Plaintiff's Exhibit 51. (Tr. 194) The plaintiff obtained permission to increase the *ad damnum* of this action by \$30,000.00, to cover three times the claimed overcharges in the handling of these 9 cars.

The original 19 cars of pine lumber were sold for \$63.00 per thousand board feet, plus freight in carload lots, and for from \$78.00 to \$80.00 per thousand board feet, including freight, in less than carload lots. (Tr. 46) No proof was offered of the relation of the prices of \$63.00, \$78.00, and \$80.00, respectively, to the prices established in MPR 94, prices which considered the many factors of grades, lengths, widths and weights, nor was any evidence offered of the number of feet of lumber contained in these cars, or whether or not any or all of the cars were sold in carload lots or less than carload lots.

The attorney for the plaintiff, in his argument to the court, said that he had established that the prices for the 9 cars were computed the same way as the original 19 cars and by applying the same "proportion" he found the single overcharge on the additional 9 cars to be \$6462.48. (Tr. 220) On the basis of this "proof", the Court included in his finding a judgment in the sum of \$12,924.96 as a part of the total judgment of \$45,664.94.

It is impossible to ascertain the amount of overcharges by merely using the ratio of 9 cars to 19 cars and determining overcharges for the 9 cars by dividing the ascertained overcharges for 19 cars by 19 and then multiplying the result by 9, since no proof was offered of the amount of lumber, the grade or grades, lengths, widths, weights or freight charges of the lumber contained in these cars or which cars were sold in carload lots and which were sold in less than carload lots. There is no rule that permits the application of "the same proportion" for the purpose of arriving at damages amount-

ing to \$12,924.96. The same proportion is no more than the conclusion of the attorney for the plaintiff. It does not reflect that all or any of the factors that needed to have been taken into consideration to arrive at the overcharges were, in fact, given consideration for this purpose. On the contrary, none of these factors was considered.

The plaintiff considered it necessary to present and presented an analysis in great detail of as many factors as he thought applicable to the transactions of the defendant with the retail yards for the purpose of qualifying, as proof, the conclusion of his analysis; which was that certain amounts shown were overcharges in the selling of the 19 cars of lumber. (Pltf's Ex. 51, Tr. 20-25) The Exhibits, for the purpose of qualifying them as evidence of overcharges show the names of the various purchasers of the lumber, the board feet of lumber sold to each of these purchasers, the estimated freight charges for each sale, the maximum prices under MPR 94 and 458 for each sale, and the amount of plaintiff's estimated overcharges for each sale. Some of the cars are shown to have been sold in less than carload lots. In these cases different prices and the different manner of establishing the freight charges are used in the exhibits. The resulting overcharges for these sales of less than carload lots reflect different factors.

In presenting his proof of overcharges involved in the 9 additional cars the plaintiff in using his "proportion" method gave no consideration to any possible differences that existed in the original transactions involved in the 19 cars nor does it appear anywhere that he gave any consideration to whether or not the additional 9 cars were full cars or broken lots out of a car or cars. The result of plaintiff's proportion method, which did not give consideration to these possible differences, is necessarily an inaccurate result and were the proof admissible otherwise the doubt and inaccuracy by reason of the failure to give

consideration to all factors involved would make this proof improper as a basis for overcharges and damages.

Proof of overcharges and damages should not be subject to doubt and varied construction. It should be exact and detailed. Plaintiff showed his understanding of this requirement by proof of damages offered with reference to the 19 cars. His rudimentary and wholly inadequate proof of overcharges and damages as to the 9 additional cars, it seems to us, makes it necessary for this Court to reduce the judgment by \$12,924.96.

VI.

The evidence and exhibits of Charles L. Baxter received over the objection of the defendant were improperly received and were prejudicial.

The Court allowed Mr. Charles L. Baxter to testify for the plaintiff that he was a lumber dealer and had been offered Mexican Ponderosa Pine by the Pan American Trading Company at \$55.00 per M board feet and that he corresponded with OPA about this offer and was advised that the purchase would violate the price ceilings imposed by Maximum Price Regulation 94. Mr. Baxter thereupon refused to handle the lumber. The defendant moved to strike this testimony (Tr. 138) and objected to the admission in evidence of the letters between Mr. Baxter and OPA. The motion to strike was denied and the exhibits were received for the purpose, as stated by the Court, of showing what the defendant should have known with his experience as a business man. (Tr. 149)

There is no dispute that the offer to sell Mr. Baxter the lumber by the Pan American Trading Company at \$55.00 per M board feet and the correspondence between OPA and the witness were unknown to the defendant prior to

the giving of the testimony on the trial, and that the defendant was in no way connected with Baxter in the transaction involving this offer to sell lumber to Baxter.

It seems impossible to reconcile the consideration of this evidence by the Court with the Court's stated purpose for considering the evidence, viz., that it established what the defendant should have known with his experience in business, with the unqualified fact that the defendant's knowledge cannot be predicated on Mr. Baxter's exclusive experience.

Again we wonder if the Court would have accepted the testimony that other persons purchased the lumber for more than \$63.00 per M board feet (the other defendants in this case) as establishing that the defendant was without fault in buying the lumber and that he did only what numerous other lumber people were doing. These other defendants were permitted by the Court, in its decree, to state that whatever was done by them in connection with the purchase and handling of this lumber was not done wilfully. (Tr. 60) The Court would have properly rejected such testimony. Yet the Court allowed the opposite of this to be proved by the Baxter testimony and letters.

The finding and decision reflect that the Court, knowing how Mr. Baxter acted, held that the defendant was therefore a wilful violator. This is a glaring *non-sequitor* and a judgment which reflects this erroneous reasoning cannot give proper consideration to the question of lack of wilfulness and the taking of practical precautions to avoid violations, to which consideration the defendant is clearly entitled and which the record shows he was not given.

The reason for the impropriety of receiving and considering this evidence for any purpose is stated in *Corpus Juris* (Secundum) Vol. 32, Sec. 576, page 432 as follows:

"Under the general rule known as '*res inter alios acta*' a litigant cannot be affected by the words or acts

of others with whom he is in no way connected and for whose words or acts he is not legally responsible."

The rule is further stated and illustrated in the case of *General Motors Corporation v. Blackmore*, 53 Fed. (2d) 725, 729 as follows:

"The defendant contends that the Court below erred in admitting evidence of various settlements made with other infringers and of recoveries had in other infringement actions as proof tending to show what was a reasonable royalty. The settlements might possibly have been offered by the defendant as some evidence in the nature of admissions by plaintiffs upon the subject of reasonable royalty to be given only such weight as might seem reasonable in view of surrounding circumstances; but neither they, nor the recoveries in other actions were properly received in evidence in support of plaintiff's case. Both lacked the element of volition upon the part of the infringers which was necessary to show true or actual value by showing what others were generally willing to pay and the licensors willing to accept."

We finally wish to quote from *Wigmore on Evidence*, Volume 2, 3rd edition, Sec. 377, page 310 in support of our position, as follows:

"2b. *Contracts evidenced by other contracts with other persons.* Here, obviously, though the principal remains the same, the other instances must be more marked in their similarity in order to be admissible to evidence as a general plan or habit because the elements to a different personality is often so important in effecting the making of the terms of a contract that the likelihood of making a similar contract with different persons is relatively much smaller. It thus happens that the Courts are generally inclined to exclude such evidence."

VII.

The Court's refusal to allow defendant and his witnesses to testify to the defendant's distribution yard facilities and to the defendant's knowledge of the grades and qualities of the lumber was improper.

Maximum Price Regulations 94 and 458 establish prices for lumber sold in carload lots designated by the regulations as mill transactions, and certain other and higher prices for lumber sold in less than carload lots out of distribution yards (Sec. 3 MPR 94). The regulations provide that lumber to be sold at the higher prices must be first made an integral part of the stock of a distribution yard and if sold from the stock will be considered a distribution yard transaction and may be sold for the higher prices.

In submitting its schedules of prices permitted by the regulations for the lumber involved in this action, plaintiff gave no consideration whatsoever to the higher prices permitted by the regulations for distribution yard transactions, treating all of the transactions, whether full carloads or partial loads as mill transactions. The exhibit, #51 of plaintiff however, indicates that a portion of the Mexican pine and all of the flooring were sold in truckload lots. None of this lumber was made a part of any of defendant's distribution yard stocks. The testimony that the defendant had facilities for storing lumber and an offer of proof of these facts were rejected by the Court on plaintiff's objection. (Tr. 173)

A strict application of the regulations to a defendant whom the Court considered guilty of wilful violations, is undoubtedly what the refusal of the Court to consider this testimony indicates. It further indicates that the Court felt that no testimony offered by the defendant or any of his witnesses, short of a compliance with the exact letter of the regulations, was permissible and would be considered by the Court. This is, however, the ap-

plication of a rule of law in an economic and business vacuum. It is an application that refused to consider difficult conditions of shortages, and pressures, and needs for scarce material that may require, and in this case the evidence would have shown that it did require speedy handling of the lumber to avoid the entangling conditions imposed by a regulation designed for a normal state of supply and demand. The condition of supply and demand was far from normal and the method of furnishing the goods under these conditions could not have conformed to the slow tempo of a regulation perhaps unwittingly, designed for plenty. It was a time of great scarcity.

It was impossible to carry out a regulation that required the unloading of lumber from the cars into lumber piles contained in a distribution yard, and from these piles to re-load them upon trucks before they could be distributed to the consumers who were clamoring for lumber to build and repair all manner of necessary structures. Unless this is done, the regulation states, the seller cannot charge the higher price allowed for distribution yard sales. It does not matter that but for the wasteful and time consuming formula of the regulation—they are distribution yard sales and can be nothing else. The seller must follow the strict and elaborate ritual of the regulation in handling of the lumber or he becomes a wilful violator and he must be punished by being charged with double the over-charges between the mill price and the price he received without regard to the fact that, except for the letter of the regulations, it was unquestionably not a mill transaction.

The Court, in refusing to hear this testimony, refused to face any facts that may have absolved the defendant from the severe penalties of the regulations. He refused to allow the defendant or his witnesses to state any of these facts. He refused to consider business practices quite fair, quite honorable, and quite old, as they

might have affected the Court's conclusion that the defendant acted wilfully as opposed to a finding that the defendant's actions with respect to these transactions were dictated by extraordinary and necessitous considerations.

We urge that the Court committed error when it refused to allow the defendant and his witnesses to testify that the defendant had distribution yard facilities. (Tr. 156, 157, 173, 175) The presence of these facilities was relevant to the question of whether the defendant was a wilful violator or whether the need for immediate distribution of the lumber prevented a compliance with the letter of the regulations.

The defendant made numerous offers of proof of the actual grades of the Mexican pine found in the cars involved in the action and all such offers were refused by the Court as something the defendant would not be permitted to "get away with". The testimony of certain of the retail yard owners, all of whom were defendants in the suit below and who bought, examined, and sold the lumber to the public and whose claim that they had not wilfully or intentionally violated the regulations in the handling of these transactions was a part of a decree entered against them in this case (Tr. 60), and who knew the contents of the cars, was not permitted by the Court on the objections of the plaintiff. (Tr. 153, 155, 162, 167, 173, 182, 197, 210) This testimony and testimony of the defendant that he knew that the cars graded high, which was also ruled out on objection (Tr. 187) was improperly refused by the Trial Court. It was relevant to lack of wilfulness for the reason that testimony that the lumber was poor in grade and known to be so by the defendant (if such testimony existed) would have been relevant to prove a wilful violation. The actual quality of the lumber and the defendant's knowledge that

that quality was sufficiently high to enable the retail yards to sell the lumber within ceilings, was testimony that should have been considered by the Court. It was applicable to the question of whether or not the defendant, Lentin, was guilty of anything more than a formal, technical or paper violation of the regulations, and, at the very least, the defendant's lack of wilfulness to commit a violation of the regulations. In this case, as the judgment now stands, the failure to receive this testimony involves the question of whether or not the judgment for \$45,665.94 was properly entered and, at the very least, whether the Court could enter a judgment for more than one-half this amount.

We contend that the Court erred in refusing to hear this testimony. That in the absence of having heard this testimony, its judgment was erroneous.

VIII.

Defendant was improperly denied credit for specified 16, 18, and 20 foot lengths, 4 and 6 inch widths, as provided in Maximum Price Regulation 94.

The provisions of revised Maximum Price Regulation 94 contain the following as applied to Common Boards (Ponderosa Pine):

“Lengths:

6. Specified lengths No. 1, 2 and 3 Common, 4 inch and 6 inch—16 feet, 18 feet, and 20 feet, add \$2.00.”

The record shows that the defendant did not receive credit of \$2.00 per thousand board feet by reason of 16, 18 and 20 foot lengths specified in all the orders for lumber listed in plaintiff's exhibit 51, which exhibit was presented and received by the Court to establish the over-

charges in 19 cars of lumber, nor was the defendant given credit for 16, 18 and 20 foot lengths in the "proportional" method used by the plaintiff in presenting the over-charges for the 9 additional cars.

Plaintiff's exhibits 4, 5b, 5c, 5d, 5e, 5f, 5g, 6, 6a, 7, 7a, 8c, 8d, 9, 9a, 10, 11, 11a, 12, 12a, 13a, 13b, 14, 14a, 15d, 15e, 16, 16a, 17, 17a, 18, 18a, 19, 20, 21, 22 and 23a, are all copies of invoices from Pan American Trading Company to J. Lentin Lumber Company, the defendant, from Pan American Trading Company to several retail yards which purchased the lumber, and from the defendant to these retail customers. In all the invoices 16, 18 and 20 foot lengths are specified and all the cars contained specified 4 inch widths. The Court refused to consider the allowance of the credit of \$2.00 per thousand board feet for the specified lengths after a lengthy and complicated inquiry into whether the defendant was entitled to the allowance under the regulation; what "specified lengths" meant, if the lumber was classified as restricted random lengths, 10 to 16 feet, 4/4 thickness only, for which \$1.00 per M board feet was to be added and not \$2.00. The Court held that because the orders (Plaintiff's Exhibit 4 and Plaintiff's Exhibit 30) specified "cars to contain approximately 30,000 feet each, 1x6 to 1x12 and 2x6 to 2x12, 10 to 20, No. 3 and better grade, Mexican Pine S-4-S widths and lengths to be well assorted, each car to contain approximately 30,000 feet each 1/2 to be 1 inch, and 1/2 to be 2 inch", that the invoicing of the cars showing 4 inch widths and 16, 18 and 20 foot lengths in all the invoices in evidence as plaintiff's exhibits was not to be considered for the purpose of allowing the defendant \$2.00 per M board feet for the lumber in each shipment that was so specified to be 4 inches wide and 16, 18 and 20 feet long. On the basis of these specifications the defendant contends that he should have been given additional credit of \$2.00 per M board feet on the entire

shipment in arriving at the amount of his alleged overcharges and that the Court erroneously refused to give him this credit. (Tr. 117 to 126)

The Court, after this discussion, threw the whole question out and nothing was allowed the defendant for these widths and lengths. It amounts to about \$2000.00 single damages and to about \$4000.00 of the judgment entered.

We refer the Court to the above specified exhibits. By order of this Court the exhibits were not to be printed but could be referred to in the briefs. (Tr. 274) Lengths are specified in detail. We contend the regulation means that the defendant may charge \$2.00 more for a thousand board feet when 16, 18 and 20 foot lengths are specified and the lumber is 4 and 6 inches wide. These conditions were clearly met in the invoices, copies of which are in evidence as exhibits.

Plaintiff's Exhibits 4 and 30 are purchase orders for 3 and 25 cars of lumber respectively. They specify widths of 6 to 12 inches and lengths of 10 to 20 feet. Plaintiff's Exhibit 5-A is an invoice from Pan-American Trading Company to Siegel Lumber Company, one of the other defendants in the case. It specifies 10 to 20 feet lengths. All of the other exhibits which are invoices from the defendant to various retail yard purchasers and from Pan-American Trading Company to the defendant, specify 8, 10, 12, 14, 16, 18 and 20 feet lengths.

We contend, therefore, that the defendant was erroneously denied a credit of about \$2000.00 and about \$4000 damages was improperly entered against him on account of the failure to credit this item to him.

IX.

The permanent injunction entered against this defendant was improperly entered in the absence of proof of the likelihood that the offense will recur.

As part of its judgment order the Court, at the request of the plaintiff, enjoined the defendant, Julian Lentin, his agents, servants, employees and attorneys permanently "from selling, purchasing, and otherwise dealing in lumber at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 94 as now or hereafter amended, Maximum Price Regulation No. 458 as now or hereafter amended, or any maximum price regulation now or which may hereafter be issued pursuant to the Emergency Price Control Act of 1942 as amended and extended, establishing maximum prices for lumber and from failing to keep records required by any of said regulations as now or hereafter amended in the manner and form required by said regulations and from otherwise violating the terms and provisions of any of said regulations as now or hereafter amended." (Tr. 254)

The record is completely devoid of any evidence to sustain the likelihood that there would be any future violations of price regulations by the defendant. The entire proof in this case was limited to violations that the defendant had been charged with having committed in the past.

Since the case of *The Hecht Co. v. Bowles, etc.*, 321 U. S. 321 courts of equity have discretion to act in each case as the equities of that case require. The rule that upon the showing of a violation it was mandatory upon the trial court to enter injunctions was held by *The Hecht Co. v. Bowles* case not to be the law.

The rule is equally well-settled that in order to support a permanent injunction against future violations there must be evidence in the record that establishes that such future violations are likely to occur. In *Shore v. United States*, 282 Fed. 857 this Court stated:

"Where injunctive relief is sought because of repeated and continuous breaches of duty or violations of the law, the evidence must show that such violations, if not prevented, will occur in the future. Relief by injunction looks to the future. Its purpose is to prevent future injury or to regulate the future conduct of a party. If transgressions have ceased before the bill is filed and before the proceedings are instituted, and if it appears that they will not be repeated, injunctive relief will not be granted. The aggrieved party will be left to his action at law. Hence, in the present instance, if the parties who maintained their premises as a nuisance in violation of the National Prohibition Act abated the nuisance and ceased violating the law, prior to the institution of any suit, injunctive relief should be denied."

In *Walling v. T. Buettner & Co.*, 133 Fed. (2d) 306 this Court stated, at page 308:

"A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. Courts of equity are not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future. * * * The remedy is never afforded on suspicion or on the ungrounded fear that the offense may be repeated in the future. * * * Employers who are acting in good faith and endeavoring to comply with the law should not be harassed by the processes of a court of equity coercing them to do what they are willing to do and are trying to do voluntarily. Equity will promptly respond to meet a violation or a threatened violation, and it will as emphatically refuse its aid where none is made to appear."

It may be assumed from the nature of the defendant's business that both prior to and since the filing of the present action against him, he handled, both as buyer, seller and broker, a large quantity of lumber of various kinds. The present action concerns itself with two transactions involving a purchase or purchases from two sellers out of a great number of transactions which this defendant has handled. The oak flooring represents a minor phase of the action. Representatives of the Office of Price Administration had examined invoices in bound volumes that were freely given to them by defendant for this purpose, and if O.P.A. investigators had found any evidence to back charges that this defendant had been a violator of regulations in any other except the case of the Mexican Ponderosa Pine purchased from the Pan American Trading Co., and the oak flooring, we can be sure that proof of these violations would have been made the basis of actions against this defendant, and testimony of such course of conduct would have been heard upon the trial of this case.

In any event there was no evidence offered by the plaintiff from which it could be implied that any other violations had occurred in the past or were likely to occur in the future through any act of this defendant.

The permanent injunction entered in this case has no basis in the record because of this failure to establish the likelihood of any future violations of price regulations. The injunction also prohibits the defendant from failing to keep records required by any regulations. Our objection to this part of the injunctive order is that, not only was there no evidence that a failure to keep records by this defendant was likely to occur in the future, but there was no evidence whatsoever that he had ever failed to keep records as required by any regulations in the past.

We believe that the injunction entered was not supported by any evidence in the record and that it is therefore an erroneous order.

CONCLUSION.

When a defendant, under the circumstances of this case, is shown to have handled nearly a million feet of lumber for an undisputed and actual profit to him of less than \$3000.00, from which must also be deducted his labor costs and his taxes, and he is assessed damages amounting to \$45,632.15 for handling this transaction, the record should be free from errors of prejudice and failure to hear and consider evidence which tend to establish partial and complete defenses to the action. The present record, we respectfully urge, is infected with such error and should be reversed.

Respectfully submitted,

HENRY H. KOVEN,
Attorney for Appellant.

LOUIS E. LEVINSON,
Of Counsel.

United States Circuit Court of Appeals
For the Seventh Circuit

I, KENNETH J. CARRICK, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Appellant's brief filed in this office on the thirtieth day of June, 1945, in:

Cause No. 5766

CHESTER A. BOWLES, Administrator, Office of Price Administration,
vs. Plaintiff-Appellee,

JULIAN LENTIN doing business as J. LENTIN LUMBER COMPANY,
Defendant-Appellant,
as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe

my name and affix the seal of said
United States Circuit Court of
Appeals for the Seventh Circuit, at
the City of Chicago, this fifteenth
day of January A. D. 1946.



Kenneth J. Carrick
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

By: Philip Blanchard
Chief Deputy Clerk

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THE HISTORY OF THE UNITED STATES

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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN
LUMBER COMPANY,
*Petitioner (Appellant-
Defendant below),*

vs.

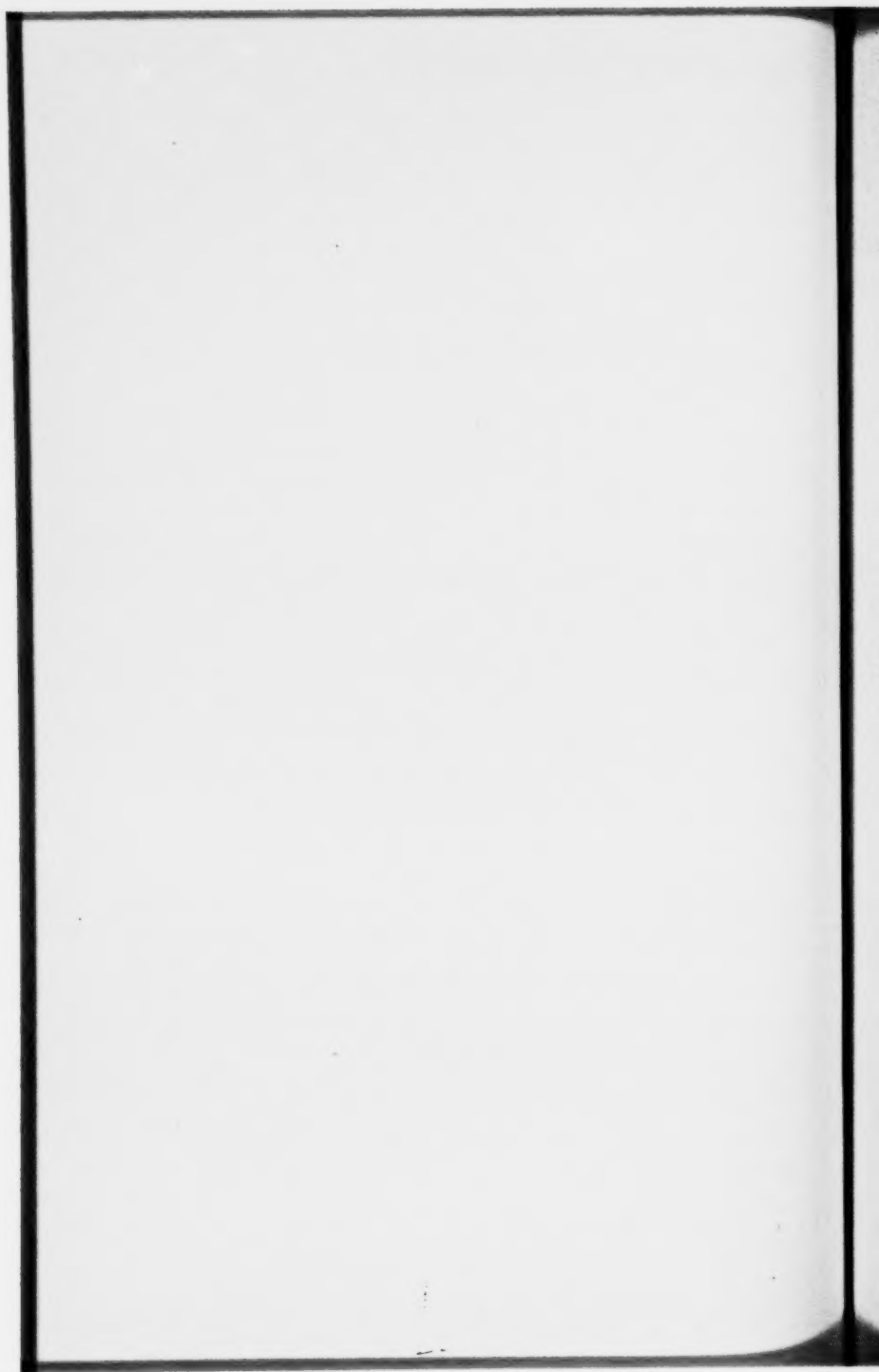
PAUL A. PORTER, SUBSTITUTED AS ADMINISTRATOR, OFFICE
OF PRICE ADMINISTRATION FOR AND ON BEHALF OF THE
UNITED STATES,
*Respondent (Appellee-
Plaintiff below).*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**MOTION TO SET ASIDE ORDER DENYING CER-
TIORARI AND FOR A RECONSIDERATION OF
THE PETITION AND SUGGESTIONS IN SUP-
PORT THEREOF.**

HENRY H. KOVEN,
1 North La Salle St.,
Chicago 2, Illinois,
Counsel for Petitioner.

LOUIS E. LEVINSON,
Of Counsel.



IN THE
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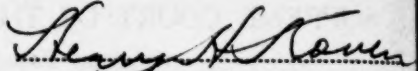
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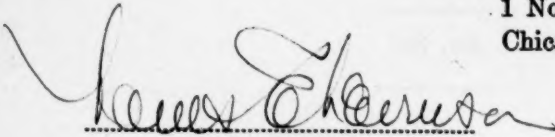
**MOTION TO SET ASIDE ORDER DENYING CER-
TIORARI AND FOR A RECONSIDERATION OF
THE PETITION.**

Now comes petitioner, Julian Lentin, doing business as
J. Lentin Lumber Company, and moves to set aside and
vacate the order of April 22, 1946, denying the petition for

certiorari herein and for a reconsideration of said petition for the reasons set forth in the suggestions accompanying this motion.



Counsel for Petitioner,
1 North La Salle St.,
Chicago 2, Illinois.



Of Counsel.
1 North La Salle St.,
Chicago 2, Illinois.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1945

No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN
LUMBER COMPANY,
*Petitioner (Appellant-
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vs.

PAUL A. PORTER, SUBSTITUTED AS ADMINISTRATOR, OFFICE
OF PRICE ADMINISTRATION FOR AND ON BEHALF OF THE
UNITED STATES,
*Respondent (Appellee-
Plaintiff below),*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS IN SUPPORT OF MOTION.

It is not disputed that petitioner's gross profit was less than \$3,000, for which judgment for \$46,665.94 was entered against him (R. 252, 189). Nowhere in the reply of the respondent filed March 12, 1946, several weeks later than provided for in the rules of this Honorable Court, was

there even an attempt to reply to this cruel and astounding penalization by way of assessment of damages not provided for in the Emergency Price Control Act nor contemplated by any known rules relating to the admeasurement of damages in Anglo-Saxon jurisprudence.

The trial judge, evidencing his bias against the class of cases to which this case belongs, himself said (R. 189):

“The Court: Well, all the force and effect I can see that has that this defendant in order to make \$2,400 on the outside, he allowed the people to be mulcted of \$16,000.”

The Eighth Amendment of the Constitution of the United States forbids cruel punishment. While the decided cases under that amendment involve criminal law the limitation upon Congress in the matter of cruel punitive legislation, suggests the parallel guaranty against double jeopardy contained in the Fifth Amendment.

Concerning “double jeopardy,” Mr. Justice Holmes in *United States v. Oppenheimer*, 242 U. S. 85 (affirming on writ of error a judgment quashing an indictment because of a previous adjudication upon a former indictment for the same offense that it was barred by the Statute of Limitations), after reviewing the historical common law background, at page 164, says:

“*In this respect the criminal law is in unison with that which prevails in civil proceedings.*” Hawkins, J., in *Reg. v. Miles*, L. R. Q. B. Div. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Com. v. Evans*, 101 Mass. 25, *the criminal law and the civil law agreeing*, as Mr. Justice Hawkins says. *Com. v. Ellis*, 160 Mass. 165, 35 N. E. 773; *Brittain v. Kinnaird*, 1 Brod. & B. 432, 129 Eng. Reprint, 789, 4 J. B. Moore, 50, Gow. N. P. 164, 21 Revised Statutes 680. *Seemingly the same view was taken in Frank v. Mangum*, 237 U. S. 309, 334, as it was also in *Coffey v. United States*, 116 U. S. 436, 445.”

The same is true of administrative proceedings. Referring to authorized administrative proceeding the Circuit Court of Appeals for the Second Circuit in *McMann v. Securities and Exchange Commission*, 87 Fed. (2d) 377 (cert. den. 301 U. S. 684) says (379):

“* * * but if it be duly authorized it is no more subject to obstruction than judicial proceedings.”

See, also, *Perkins v. Endicott Johnson Corporation*, 128 Fed. (2d) 208, 214, per Circuit Judge Frank affirmed *sub nom. Endicott Johnson Corporation v. Perkins*, 317 U. S. 501. Please see majority opinion by Mr. Justice Jackson.

In *Dennison v. Payne*, 293 Fed. 333 (C. C. A. 2), action at law to recover damages for plaintiff's intestate arising out of federal control of Delaware, Lackawanna & Western Railroad Co., at 341:

“It is also undoubted law that the rule which forbids the re-opening a matter once judicially determined by competent authority applies as well to the judicial and quasi judicial acts of public officers and boards as well as to judgments of courts having general judicial powers.”

See also:

United States v. Kearns, 115 Fed. (2d) 555 (C. C. A. 10).

Modern Woodmen of America v. Casados, 17 Fed. Supp. 763, 766.

Applying the fundamental constitutional safeguard of the Eighth Amendment, it seems inconceivable that this Honorable Court upon a reconsideration of the petition herein will suffer the judgment for \$46,665.94 to stand in the light of the uncontradicted showing that less than \$3,000 was the sole net income to petitioner upon the alleged infraction of the regulation.

The denial of the writ herein is contrary to the views expressed by Mr. Justice Murphy, in the majority opinion in *M. Kraus & Bros. v. United States*, Adv. Sh. 66 S. Ct. 705 (decided March 25, 1946), at 707:

"The delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. *Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action.* In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation."

The trial Court's refusal of petitioner's evidence showing his good faith, in the light of the prejudice against the class of cases to which the instant case belongs, is a definite denial of a trial according to the law of the land.

Moore v. Dempsey, 261 U. S. 86, 91.

Brown v. Mississippi, 297 U. S. 278, 285.

So, too, the trial Court's exclusion of petitioner's evidence and offers of proof worked a confiscation of petitioner's property in assessing damages referable to the following items:

- (a) Petitioner's distribution yards and facilities;
- (b) Credit for 16, 18 and 20 feet lengths;
- (c) Petitioner's status as a broker;
- (d) The alleged overcharges on 9 cars not covered by the original complaint;
- (e) As to the grade of lumber.

--What petitioner did was under legal compulsion. The wording of the press release, part of Amendment Eight, was clear enough to work legal compulsion.

United States v. United States Steel Corporation,
251 U. S. 417, 447.

Panama Refining Co. v. Ryan, 293 U. S. 388, 429.

In the light of the majority opinion of Mr. Justice Murphy in the recent *M. Kraus & Bros. v. United States* (Adv. Sh. 66 S. Ct. 705), the trial Court's reliance upon Baxter's advice by the Kansas City office of OPA against petitioner's advice by the Chicago office of OPA denied to petitioner the guaranty of Article IV, Section 2, of the Constitution of the United States, viz: "The citizens of each state shall be entitled to all of the privileges and immunities of the several states."

The plain dictates of justice, we deferentially submit, call for a reconsideration of the petition for writ of certiorari herein, and the allowance thereof to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

HENRY H. KOVEN,
1 North La Salle St.,
Chicago 2, Illinois,
Counsel for Petitioner.

LOUIS E. LEVINSON,
Of Counsel,
1 North La Salle St.,
Chicago 2, Illinois.